

# EXHIBIT A

Richard Martinotti

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IN THE UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF NORTH CAROLINA

\*\*\*\*\*

BOBBY J. CHOPLIN, )

Plaintiff, )

v. ) CIVIL ACTION NO.

INTERNATIONAL BUSINESS ) 1:16-CV-1412-TDS-JEP

MACHINES CORPORATION, )

Defendant. )

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Video-Recorded 30(b)(6) Deposition  
of

INTERNATIONAL BUSINESS  
MACHINES CORPORATION

through

RICHARD MARTINOTTI

Chicago, Illinois

October 19, 2017

9:01 a.m. - 2:44 p.m.

Richard Martinotti

<p style="text-align: right;">Page 2</p> <p>1 The 30(b)(6) deposition of INTERNATIONAL 2 BUSINESS MACHINES CORPORATION through RICHARD 3 MARTINOTTI, held at the law offices of: 4 5 6 7 JACKSON LEWIS, P.C. 8 150 North Michigan Avenue, Suite 2500 9 Chicago, Illinois 60601 10 11 12 Pursuant to Plaintiff Bobby J. Choplin's 13 Rule 30(b)(6) Notice of Deposition of International 14 Business Machines Corporation, before Pauline M. 15 Vargo, Notary Public and Illinois Certified 16 Shorthand Reporter, Illinois CSR No. 84-1753. 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p style="text-align: center;">INDEX</p> <p>Thursday, October 19, 2017</p> <p>WITNESS EXAMINATION</p> <p>RICHARD MARTINOTTI</p> <p>By Mr. Lee.....Page 11</p> <p>By Mr. Barnes.....Page 192</p> <p>By Mr. Lee.....Page 195</p> <p>Afternoon Session Commenced.....Page 138</p> <p style="text-align: center;">EXHIBITS</p> <p>EXHIBIT MARKED FOR ID</p> <p>Exhibit 62 Plaintiff's Rule 30(b)(6) 10 Amended Notice of Deposition of IBM, 7 Pages</p> <p>Exhibit 63 Defendant IBM Corporation's 12 Objections to Plaintiff's Rule 30(b)(6) Notice of Deposition of IBM, 7 Pages</p> <p>Exhibit 64 Spreadsheet re ELA/large deal 37 transactions, IBM-CHOPLIN004266 through IBM-CHOPLIN004271</p> <p>Exhibit 65 PowerPoint, "Your 2015 Incentive 66 Plan Individual Quota Plan (IQP) - Employees" IBM003725 through IBM003742</p>
<p style="text-align: right;">Page 3</p> <p style="text-align: center;">APPEARANCES</p> <p>Present on Behalf of the Plaintiff:</p> <p>WHITFIELD BRYSON &amp; MASON, LLP 900 West Morgan Street Raleigh, North Carolina 27603 919.600.5000 BY: MATTHEW E. LEE, ESQUIRE, matt@wbmlp.com</p> <p>Present on Behalf of the Defendant:</p> <p>JACKSON LEWIS, P.C. 1155 Peachtree Street NE, Suite 1000 Atlanta, Georgia 30309.3600 404.525.8200 BY: JUSTIN R. BARNES, ESQUIRE barnesjr@jacksonlewis.com</p> <p>Videographer: STEPHAN HOOG Golkow Technologies</p>	<p style="text-align: right;">Page 5</p> <p style="text-align: center;">EXHIBITS</p> <p>Continued</p> <p>EXHIBIT MARKED FOR ID</p> <p>Exhibit 66 PowerPoint, "Incentives 101" 66 IBM003655 through IBM003668</p> <p>Exhibit 67 PowerPoint, "2015 Sales 66 Incentives 1H Incentive Plan Overview - IBM Commerce - Software" IBM003572 through IBM003654</p> <p>Exhibit 68 PowerPoint, "Your 2013 Incentive 87 Plan" IBM003684 through IBM003701</p> <p>Exhibit 69 PowerPoint, "Your 2014 Incentive 87 Plan Individual Quota Plan (IQP) - Managers" IBM003702 through IBM003724</p> <p>Exhibit 70 PowerPoint, "Sales Incentives 89 Introduction to IBM Incentive Plans for Managers," IBM003669 through IBM003683</p> <p>Exhibit 71 PowerPoint, "What's New in 2015" 93 IBM003878 through IBM003883</p> <p>Exhibit 72 PowerPoint, "Why does it pay 94 to care?" IBM004027 through IBM004034</p> <p>Exhibit 73 PowerPoint, "Why does it pay 98 to care?" IBM003978 through IBM003992</p> <p>Exhibit 74 7/10/15 e-mail from Martinotti 100 to Moorer, et al IBM000805 through IBM000807</p> <p>Exhibit 75 8/19/15 e-mail from Martinotti 111 to dos Santos, et al, IBM000209 and IBM000216</p> <p>Exhibit 76 7/13/15 e-mail from Moorer to 115</p>

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<p style="text-align: right;">Page 10</p> <p>1 (Exhibit 62 was marked for 2 identification, as of 10/19/17.) 3 THE VIDEOGRAPHER: We are now on the 4 record. My name is Stephan Hoog. I am the 5 videographer in association with Golkow 6 Technologies. 7 Today's date is October 19th, 2017. 8 The time is 9:01 a.m. as indicated on the 9 video screen. This videotaped deposition is 10 being held in Chicago, Illinois, in the matter 11 of Choplin versus IBM Corporation in the U.S. 12 District Court, Middle District of North 13 Carolina. The deponent is Richard Martinotti. 14 Will counsel please introduce 15 themselves for the video record. 16 MR. LEE: I'm Matthew Lee for the 17 Plaintiff. 18 MR. BARNES: Justin Barnes for the 19 Defendant. 20 THE VIDEOGRAPHER: The court reporter 21 is Pauline Vargo. Can you please swear in the 22 witness. 23 THE REPORTER: Raise your right hand, 24 please, to be sworn. 25 (The witness was duly sworn.)</p>	<p style="text-align: right;">Page 12</p> <p>1 Q. Okay. I understand that you are the 2 only designee today that IBM has presented; is that 3 correct? 4 MR. BARNES: That's correct. 5 MR. LEE: Okay, okay. Fair enough. 6 (Exhibit 63 was marked for 7 identification, as of 10/19/17.) 8 BY MR. LEE: 9 Q. Also, we've marked as Exhibit 63 a copy 10 of objections to this 30(b)(6) notice. These are 11 objections that IBM has made after we issued the 12 notice, and I just want to make sure that we have a 13 clear understanding. 14 Are you prepared to discuss each topic 15 on Exhibit 62 except where IBM has objected there 16 in writing on Exhibit 63 and also indicated it does 17 not intend to produce a witness? 18 A. Yes. 19 Q. Can we rely on your answers and 20 statements today as the answers and statements of 21 IBM? 22 A. Yes. 23 Q. Mr. Martinotti -- I'm pronouncing that 24 right? 25 A. You're good.</p>
<p style="text-align: right;">Page 11</p> <p>1 RICHARD MARTINOTTI, 2 called as a witness herein, having been first duly 3 sworn, was examined and testified as follows: 4 EXAMINATION 5 BY MR. LEE: 6 Q. Good morning, Mr. Martinotti. 7 A. Good morning. 8 Q. My name is Matthew Lee. I will be 9 taking your deposition today. 10 Could you please state your full name 11 and residential address for the record. 12 A. Richard Martinotti, M-a-r-t-i-n-o-t-t-i. 13 I live at 30 East Huron, Chicago, Illinois. 14 Q. Mr. Martinotti, I'm showing you what we 15 have marked as Exhibit 62. This is a copy of a 16 30(b)(6), a Rule 30(b)(6) deposition notice that we 17 have issued in this action. Have you seen this 18 before? 19 A. Yes. 20 Q. And do you understand what a 21 Rule 30(b)(6) deposition is? 22 A. Yes. 23 Q. Okay. And you have given several of 24 these before, haven't you? 25 A. Yes.</p>	<p style="text-align: right;">Page 13</p> <p>1 Q. Great. 2 A. Close. 3 Q. Okay. Would you agree that IBM has an 4 obligation to be honest with its sales 5 representatives? 6 A. Yes. 7 Q. Would you agree that IBM has an 8 obligation to be honest with its sales 9 representatives about their compensation? 10 A. Yes. 11 Q. And compensation includes commissions 12 for sales representatives at IBM, doesn't it? 13 A. Yes. 14 Q. Would you agree that IBM has an 15 obligation to treat its sales representatives 16 fairly? 17 A. Yes. 18 Q. Would you agree that IBM has an 19 obligation to be clear with sales representatives 20 when it explains the terms of their compensation? 21 A. Yes. 22 Q. Would you agree that giving 23 contradictory information to sales representatives 24 is not being clear with them? 25 MR. BARNES: I'm going to object to</p>

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<p style="text-align: right;">Page 14</p> <p>1 the form of that question.</p> <p>2 BY MR. LEE:</p> <p>3 Q. You can answer.</p> <p>4 MR. BARNES: Go ahead.</p> <p>5 THE WITNESS: Repeat the question.</p> <p>6 I'm sorry.</p> <p>7 BY MR. LEE:</p> <p>8 Q. Sure. Would you agree that giving</p> <p>9 contradictory information to sales representatives</p> <p>10 about their compensation is not being clear with</p> <p>11 them?</p> <p>12 MR. BARNES: I'm still going to object</p> <p>13 to the question, but go ahead and answer.</p> <p>14 BY THE WITNESS:</p> <p>15 A. I would say yes.</p> <p>16 BY MR. LEE:</p> <p>17 Q. Would you agree that IBM has an</p> <p>18 obligation not to mislead its sales representatives</p> <p>19 about their compensation?</p> <p>20 A. Yes.</p> <p>21 Q. And would you agree if IBM becomes aware</p> <p>22 that sales representatives are confused about their</p> <p>23 compensation or misunderstand the terms of the</p> <p>24 plan, IBM has an obligation to make reasonable</p> <p>25 efforts to clarify the plan?</p>	<p style="text-align: right;">Page 16</p> <p>1 Bobby Choplin that his earnings opportunity remains</p> <p>2 uncapped. Is that your understanding?</p> <p>3 MR. BARNES: I'm just going to object</p> <p>4 to that question.</p> <p>5 MR. LEE: I can rephrase it.</p> <p>6 BY MR. LEE:</p> <p>7 Q. Would you agree that IBM represented to</p> <p>8 Bobby Choplin when explaining his compensation for</p> <p>9 the first half of 2015 that his earnings</p> <p>10 opportunity remains uncapped?</p> <p>11 A. I can't tell you specifically what the</p> <p>12 conversation that they had between the two of them,</p> <p>13 but I know that we have education packages that the</p> <p>14 managers are given to review with their employees.</p> <p>15 Q. And I just need to make sure that this</p> <p>16 is entirely clear because this is an important</p> <p>17 aspect of the case that's being litigated right</p> <p>18 now. You understand that, don't you?</p> <p>19 A. Yes.</p> <p>20 Q. I'm showing you what we have previously</p> <p>21 marked as Exhibit 5.</p> <p>22 MR. LEE: Justin, I think you --</p> <p>23 MR. BARNES: I've got a copy.</p> <p>24 MR. LEE: Okay, okay.</p> <p>25</p>
<p style="text-align: right;">Page 15</p> <p>1 A. Clarify it with the individual, yes.</p> <p>2 Q. Why do you make that qualification?</p> <p>3 A. Aside from the fact that -- I mean, you</p> <p>4 know, to me I -- it's -- as the employee -- we've</p> <p>5 got 400,000-plus employees, so if we have an</p> <p>6 employee that has a question, I would expect his</p> <p>7 first-line manager to be able to explain the sales</p> <p>8 plan to the employee, yes.</p> <p>9 Q. Mr. Martinotti, would you agree that</p> <p>10 it would be wrong for IBM to profit from sales</p> <p>11 representatives' confusion about its compensation</p> <p>12 plan if IBM is aware of the confusion and doesn't</p> <p>13 try to address it?</p> <p>14 MR. BARNES: I'm going to object to</p> <p>15 that question.</p> <p>16 BY MR. LEE:</p> <p>17 Q. You can answer.</p> <p>18 A. I would say yes.</p> <p>19 Q. Mr. Martinotti, would you agree that</p> <p>20 it's reasonable for sales representatives to rely</p> <p>21 on what IBM tells them about their compensation</p> <p>22 plan?</p> <p>23 A. Yes.</p> <p>24 Q. When explaining his compensation plan</p> <p>25 for the first half of 2015, IBM represented to</p>	<p style="text-align: right;">Page 17</p> <p>1 BY MR. LEE:</p> <p>2 Q. Have you seen this before?</p> <p>3 A. Yes, I have.</p> <p>4 Q. Okay. Do you recognize the chart that's</p> <p>5 included in Exhibit 5?</p> <p>6 A. I recognize it from this note, yes.</p> <p>7 Q. What do you mean?</p> <p>8 A. Yeah, I recognize it because it's</p> <p>9 embedded in this note. Yes, I recognize this</p> <p>10 document.</p> <p>11 Q. And you have seen this e-mail before?</p> <p>12 A. Yes.</p> <p>13 Q. So that's how you recognize the chart?</p> <p>14 A. Yes.</p> <p>15 Q. Have you ever seen it anywhere else?</p> <p>16 A. We have it in our education packages.</p> <p>17 Q. Okay. And this is an e-mail that Tom</p> <p>18 Batthany sent to his team, which includes Bobby</p> <p>19 Choplin, on January 23rd, 2015, is it not?</p> <p>20 A. Commerce team, Bobby Choplin, Jean, yes.</p> <p>21 Q. And this is an effort by Tom Batthany,</p> <p>22 Bobby Choplin's first-line manager, to explain his</p> <p>23 compensation plan to him for the first half of</p> <p>24 2015; is that correct?</p> <p>25 MR. BARNES: I'm going to object to</p>

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<p>1 that question, but go ahead.</p> <p>2 BY MR. LEE:</p> <p>3 Q. You can answer.</p> <p>4 A. Yes.</p> <p>5 Q. When Tom Batthany sent this e-mail, he</p> <p>6 was doing his job, wasn't he?</p> <p>7 A. He was explaining, yes.</p> <p>8 Q. Okay. He was explaining --</p> <p>9 A. Yes.</p> <p>10 Q. -- the compensation plan, which is part</p> <p>11 of his job, right?</p> <p>12 A. Yes.</p> <p>13 Q. And if you look down in the chart that's</p> <p>14 copied there, this chart is -- under "Earnings</p> <p>15 Opportunity," do you see that?</p> <p>16 A. Um-hmm, yes. I'm sorry.</p> <p>17 Q. The fourth bullet point, could you read</p> <p>18 that, please.</p> <p>19 A. "Earnings opportunity remains uncapped."</p> <p>20 Q. Okay. So you would agree that IBM when</p> <p>21 explaining his compensation plan for the first half</p> <p>22 of 2015 represented to Bobby Choplin that his</p> <p>23 earnings opportunity remains uncapped, wouldn't</p> <p>24 you?</p> <p>25 A. Correct.</p>	<p>1 Q. Okay. Tell me about where you went to</p> <p>2 school. Just pretend that we are at a cocktail</p> <p>3 party and you are telling me a little bit about</p> <p>4 your background, where you went to college, what</p> <p>5 you majored in and then what you did when you got</p> <p>6 out in the working world.</p> <p>7 A. Four years over at Illinois State</p> <p>8 University over in Bloomington-Normal, Illinois, BA</p> <p>9 in administration and finance. I graduated during</p> <p>10 the fall semester, and then in February of '79 I</p> <p>11 joined IBM. I was in the -- in a IBM Chicago</p> <p>12 office for 2 years, then went down to Bloomington,</p> <p>13 Illinois, for 4-1/2 years on the State Farm</p> <p>14 account; then went back to Chicago for two years;</p> <p>15 then went to Bloomington -- or Peoria, Illinois, for</p> <p>16 six years; then two years in Springfield, one year</p> <p>17 in St. Louis; and then I was back here in Chicago</p> <p>18 for the rest of the time.</p> <p>19 Q. Okay. Take me through what your</p> <p>20 positions were. Have you ever had a sales</p> <p>21 position?</p> <p>22 A. Not a sales position.</p> <p>23 Q. Okay. I'm sorry. I jumped in,</p> <p>24 interrupted myself with another question.</p> <p>25 So you never had a sales position. Take</p>
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<p>1 Q. Would you also agree that IBM</p> <p>2 represented to Bobby Choplin regarding his first</p> <p>3 half of 2015 compensation plan that payments were</p> <p>4 uncapped?</p> <p>5 A. Correct.</p> <p>6 Q. So would you agree that IBM had an</p> <p>7 obligation not to cap Bobby Choplin's earnings</p> <p>8 opportunity?</p> <p>9 A. Yes.</p> <p>10 Q. Would you agree that IBM had an</p> <p>11 obligation not to cap Bobby Choplin's payments?</p> <p>12 A. Correct.</p> <p>13 Q. Mr. Martinotti, could you tell me a</p> <p>14 little bit about -- you work for IBM, right?</p> <p>15 A. Correct.</p> <p>16 Q. How long have you worked there?</p> <p>17 A. 38 years.</p> <p>18 Q. That's a little while.</p> <p>19 A. Unfortunately.</p> <p>20 Q. Have you ever worked anywhere else?</p> <p>21 A. No. Right out of college.</p> <p>22 Q. Right out of college, straight to IBM?</p> <p>23 A. Yes.</p> <p>24 Q. Have you always lived in Chicago?</p> <p>25 A. No.</p>	<p>1 me through your positions at IBM.</p> <p>2 A. Administration and then finance.</p> <p>3 Q. Okay. What does that entail?</p> <p>4 A. Administration; in the earlier part of</p> <p>5 my career I managed the administrative staffs, the</p> <p>6 asset staffs that were originally housed here in</p> <p>7 each of the offices. They did all of the ordering</p> <p>8 of the products; I'm doing all of the compensation</p> <p>9 calculations and accounts receivable, then moved</p> <p>10 into the finance side of it, which was more focused</p> <p>11 on going through and dealing with the quotas, the</p> <p>12 budgets and compensation.</p> <p>13 Q. Okay. And part of your job today is to</p> <p>14 review commissions to determine whether they are</p> <p>15 appropriate for sales representatives; is that fair</p> <p>16 to say?</p> <p>17 A. I don't review them. I implement the</p> <p>18 programs for the review process. So, what I will</p> <p>19 do is I will manage the -- the process, the</p> <p>20 physical review, the physical determinations of</p> <p>21 decisions are done by the line management, the line</p> <p>22 sales management; and then I will implement based</p> <p>23 on what they come forward with.</p> <p>24 Q. Who is included in the line sales</p> <p>25 management?</p>

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<p>1 A. So the line sales management would be</p> <p>2 the first line manager, the second line manager of</p> <p>3 the sales individual and their senior executive</p> <p>4 staff.</p> <p>5 Q. And so that would depend on what</p> <p>6 department it was in?</p> <p>7 A. Um-hmm.</p> <p>8 Q. Is that a yes?</p> <p>9 A. Oh, I'm sorry. I apologize.</p> <p>10 Q. That's fine.</p> <p>11 A. Yes.</p> <p>12 Q. Not a problem at all, and I'm not trying</p> <p>13 to be rude when I say that. I just want to try</p> <p>14 and --</p> <p>15 A. I get it. I forgot, yeah.</p> <p>16 Q. And so for Bobby Choplin, his first line</p> <p>17 manager was Thomas Batthany, correct?</p> <p>18 A. Yes.</p> <p>19 Q. The second line manager was --</p> <p>20 A. Haleh.</p> <p>21 Q. -- was Haleh Maleki?</p> <p>22 A. Halch, yeah. I caught it, sorry, yeah.</p> <p>23 Q. I got corrected on that.</p> <p>24 A. Well, sorry, yeah.</p> <p>25 Q. No, that's okay.</p>	<p>1 advice and counsel from, you know, his senior</p> <p>2 executives.</p> <p>3 Q. Where did the buck stop with respect to</p> <p>4 the decision on Bobby Choplin's BB&amp;T commissions?</p> <p>5 A. For this specific, this account level</p> <p>6 inspection program, it was John Dunderdale.</p> <p>7 Q. Okay. When you say "account level</p> <p>8 inspection program," that sounds like a specific</p> <p>9 term. Is that correct?</p> <p>10 A. It's -- it's just a title for the</p> <p>11 inspection program that was in place for this</p> <p>12 specific situation.</p> <p>13 Q. Okay. Is that the significant</p> <p>14 transactions --</p> <p>15 A. Yes.</p> <p>16 Q. -- review process?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Are there other types of review</p> <p>19 processes aside from the significant transactions</p> <p>20 review?</p> <p>21 A. Aside from that account level inspection</p> <p>22 program, there is a number of different significant</p> <p>23 transaction reviews. They are all part of that</p> <p>24 umbrella, but yes, there is a number of inspection</p> <p>25 programs that we had in place in 2015.</p>
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<p>1 A. And then Sean Flynn. Well, so Sean</p> <p>2 Flynn is the Commerce senior executive within North</p> <p>3 America. He runs the brand. He -- the sales</p> <p>4 teams, the brand sales teams dotted-line into Sean.</p> <p>5 And by "dotted line," I say they have directional</p> <p>6 and review and HR, you know, type responsibilities.</p> <p>7 And then within the branch or the region</p> <p>8 that they are in back in that terminology, back in</p> <p>9 2015, Mid-Atlantic, he reported up into the sales</p> <p>10 management team, which is Randolph Moorer.</p> <p>11 Q. Okay.</p> <p>12 A. And then Randolph reports up into John</p> <p>13 Dunderdale.</p> <p>14 Q. And so the way I understand your</p> <p>15 testimony is you don't exercise any judgment about</p> <p>16 what somebody should or should not get paid; is</p> <p>17 that fair to say?</p> <p>18 A. Correct.</p> <p>19 Q. Who does?</p> <p>20 A. The line management that I just</p> <p>21 described.</p> <p>22 Q. All of them?</p> <p>23 A. They all have a piece of it. The</p> <p>24 primary or the starting point is the first line</p> <p>25 manager, and that first line manager then takes</p>	<p>1 Q. Can you help me understand how those all</p> <p>2 work together?</p> <p>3 A. They were in place for specific</p> <p>4 situations. So, as an example, the account level</p> <p>5 inspection program looked at significant large ELA</p> <p>6 business activity versus we have the absolute sales</p> <p>7 plan and we had a review within the absolute sales</p> <p>8 plan process.</p> <p>9 We have a review in the -- what we call</p> <p>10 the SaaS or Software as a Service's business,</p> <p>11 because in the case of the Software as a Services,</p> <p>12 SaaS, business, that was a brand new business for</p> <p>13 us; and we want to -- wanted to ensure that the</p> <p>14 program as we built it was -- was being</p> <p>15 implemented, so that was the inspection.</p> <p>16 Q. Anything other than those three types</p> <p>17 that you've discussed?</p> <p>18 A. There is a number of inspections that</p> <p>19 are done outside of the software organization.</p> <p>20 Those three that I've highlighted were specific to</p> <p>21 the software business.</p> <p>22 Then, on a broader scale, the business</p> <p>23 does what's called an out-of-range review with</p> <p>24 their first line managers. If someone is</p> <p>25 significantly out of a range within, you know, a</p>

7 (Pages 22 to 25)



Richard Martinotti

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1 specific month of achievement, it triggers a review  
 2 and, you know, the business asks the first line  
 3 manager just simply to go through and ensure that  
 4 there is no anomalies; there is no, you know -- you  
 5 know, situations whereby the quota was wrong, the  
 6 revenue was wrong, the territory was set up  
 7 incorrectly in the sense that, you know, Rick  
 8 Martinotti should not have been assigned to Acme  
 9 Paint and he got Acme Paint incorrectly, that type  
 10 of situation.

11 Q. Okay.

12 A. So as to then, you know, avoid going  
 13 through and inadvertently paying Rick Martinotti  
 14 for Acme Paint, you know, that type of deal.

15 Q. And that's the out-of-range review  
 16 process?

17 A. Those are the -- yeah, yeah.

18 Q. So there are four different type of  
 19 inspection processes that relate to commissions:  
 20 the account level inspection program, the absolute  
 21 sales plan process, the SaaS business review and  
 22 out-of-range review?

23 A. Correct.

24 Q. And the account level, that's the one  
 25 that relates to significant transactions, right?

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1 A. All of them relate to significant  
 2 transactions. You know, again, in the sense of the  
 3 out of range, again, like I said, that Acme Paint  
 4 transaction could have been the driver that brought  
 5 that person out of range and Acme Paint should not  
 6 have been assigned to Rick Martinotti. That is a  
 7 significant transaction that needed to be addressed  
 8 and needed to be corrected.

9 Q. What is a significant transaction? How  
 10 is that defined?

11 A. It's based on the territory and based on  
 12 the circumstances. So, in the case of the account  
 13 level inspection program, we look at transactions,  
 14 ELA transactions within North America, the North  
 15 American region at \$10 million or greater.

16 However, the line management, the  
 17 regional VP has the ability to go through and  
 18 request a review that's, you know, less than that.  
 19 They have the ability to go through and request it.  
 20 So, you know, it's circumstance -- it's based on  
 21 the circumstances of that specific situation.

22 Q. Could a review ever be triggered just by  
 23 someone feeling like, wow, that sales rep is going  
 24 to make a lot of money this period?

25 A. No. I mean -- I mean, in the case of

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1 the account level inspection, as an example, you  
 2 are tending to go through and do the situation  
 3 because of it's a complex transaction, there is  
 4 multiple people there, and you are wanting to  
 5 ensure that the representation and all of the  
 6 particulars are correct.

7 In the case of the out-of-range  
 8 situation, that's not triggered by the first line  
 9 manager. That's just triggered by the fact that  
 10 the circumstances, that the roll-up of the revenue  
 11 achievement is calculated to be out of range.

12 In the case of the SaaS situation,  
 13 that's triggered -- originally it was triggered at  
 14 being 250 percent of plan. It was raised to 400  
 15 percent of plan. But, you know, there is various  
 16 types of, you know, rationales or triggers.

17 Q. Are sales reps told that these 250  
 18 percent or 400 percent thresholds exist?

19 A. Yes. They are aware of it.

20 Q. How do you know that?

21 A. It's the first line managers in the --  
 22 it's the first line managers and the second line  
 23 managers communicating that to the reps, and my  
 24 conversations with the second line managers and the  
 25 regional VPs have stated that, you know, that they

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1 have said that to them.

2 Q. Is it in -- are those thresholds  
 3 explained to sales representatives in any of the  
 4 written materials?

5 A. No. The programs themselves are  
 6 specific to the year, you know, but the significant  
 7 transaction statement is specifically highlighted  
 8 and reviewed because it's embedded in the IPL.

9 Q. Okay. Is the significant transactions  
 10 language included anywhere besides the IPL?

11 A. In the -- there is education packages.  
 12 No. I would have to go and look. I believe that,  
 13 you know, in the case of the management, you know,  
 14 correspondence, yes. It's built into the  
 15 quota-setting guideline statement. It's built into  
 16 the management -- on the manager instructions, the  
 17 MIOG. So, from a manager's perspective, yes, there  
 18 is further documentation and correspondence with  
 19 regards to significant transaction, you know, and  
 20 what that means, you know, the scope of it.

21 Q. Okay. Can you point to a document that  
 22 was given to Bobby Choplin that references the  
 23 significant transaction provision aside from the  
 24 IPL prior to the BB&T deal being closed?

25 A. I -- I can't, no.

8 (Pages 26 to 29)

Richard Martinotti

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<p>1 Q. So, Mr. Martinotti, what is your title 2 right now at IBM? 3 A. Finance manager, software. 4 Q. Okay. Who is your boss? 5 A. Scott Goodwin. 6 Q. Who is Scott Goodwin's boss? 7 A. Cynthia Alexander. 8 Q. Is John Dunderdale anywhere in that 9 line? 10 A. No. John is line sales. Scott, myself 11 and Cynthia are finance. 12 Q. Give me a brief description of what your 13 responsibilities are as the finance manager, 14 software. 15 A. So, I manage a team that deals with the 16 quota modeling and the revenue recognition and then 17 the commission. I'm a commissions interface for 18 our incentives team down in Brazil. 19 Q. Do you work closely with the team in 20 Brazil? 21 A. Yes. 22 Q. Have you ever been down there? 23 A. Unfortunately not. They don't let me. 24 You know, even my, you know, direct reports, Sharon 25 who reports in to me has been down there, but I</p>	<p>1 MR. BARNES: I think you said 2 "Kravitz," but I'm pretty -- 3 MR. LEE: Like Lenny? 4 MR. BARNES: I'm pretty sure it is 5 "Kavitz." 6 THE WITNESS: It is "Kavitz," but I 7 kind of figured that's what you meant, yeah. 8 BY MR. LEE: 9 Q. Okay. Have you been -- are you aware of 10 any other lawsuits involving a software sales 11 representative that have been filed and relate to a 12 commission payment dispute? 13 A. Yes. 14 Q. Tell me about what commissions lawsuits 15 you are aware of. 16 A. Well, I shouldn't say lawsuits. I just 17 know that they're -- I have been notified to hold 18 archived documents. So, whether or not it is in a 19 lawsuit, you know -- you know, nature at this 20 point, I can't tell you that, but I do know that I 21 have two individual, you know, requests to hold 22 documentation. 23 Q. How many times has IBM been sued, to 24 your knowledge, relating to commissions payments? 25 A. Oh, I don't know. Honestly, I don't</p>
Page 31	Page 33
<p>1 have not been having the opportunity to get down 2 there. Even for the Olympics -- even for the 3 Olympics they did not find a reason for me to get 4 down there. 5 Q. We will put a formal protest on the 6 record here. 7 MR. BARNES: Yeah, seriously. 8 A. Exactly. 9 Q. Since we started talking about this a 10 little bit, I want to go ahead and dig into these. 11 Before I do that, Mr. Martinotti, how 12 many depositions have you testified in? 13 A. This will be my fourth. 14 Q. Okay. Because I think my records 15 indicated you testified at the Kravitz [as 16 pronounced] -- in the Kravitz case, the Schwarzkopf 17 case, the Wilson case and then this would be the 18 fourth deposition? 19 A. Yes. 20 Q. Does that sound right? 21 A. Yeah. 22 MR. BARNES: Kavitz, K-a-v-i-t-z? 23 MR. LEE: That might be it. 24 THE WITNESS: Yeah. 25 MR. LEE: Did I say that wrong?</p>	<p>1 know. 2 Q. How many are you aware of? 3 A. Well, these four. I have been aware of 4 requests for holding documentation that never went 5 -- or at least asked me to do a deposition against, 6 so I don't know if it ever, you know, went further. 7 Q. How many times has that happened? 8 A. Probably three or four times. 9 Q. Are you aware of any times where someone 10 has threatened to file a lawsuit against IBM with 11 respect to a commissions payment but it didn't end 12 up with a letter asking to preserve documents or a 13 filed lawsuit where you gave a deposition? 14 A. Are you asking whether or not I know of 15 a person saying that "I'm going to sue you" but 16 never does? 17 Q. Right. 18 A. Yeah. I mean, people, you know, spout 19 out things like that, you know, time and time 20 again. Right? 21 Q. I mean, does that happen all the time? 22 A. Well, I mean, I wouldn't say it happens 23 all the time, but it is no different than, you 24 know, a person having an argument and saying, you 25 know, "I'm gonna shoot you" or something. I mean,</p>

9 (Pages 30 to 33)

Richard Martinotti

<p style="text-align: right;">Page 34</p> <p>1 you know, people have offhanded comments all the 2 time, so I'm not sure where that one is going, 3 where that question is going. 4 Q. I just want to know how many times you 5 are aware of someone threatening to file a lawsuit 6 or even being upset about a decision on their 7 commissions payment. 8 A. Let's put it this way: I have been 9 witness, I have been, you know, on the phone having 10 conversations with a number of salespeople who have 11 been upset and had to be -- you know, we had to 12 talk it further and to get more clarity. So, I've 13 had conversations in that sense of the word. I've 14 had a number of those conversations. 15 Q. Okay. 16 A. And I've had a number of conversations 17 whereby once we've had more clarity for them, they 18 basically came off the ledge. Let's put it that 19 way. 20 Q. Would it be fair to say that they 21 misunderstood IBM's policy with respect to payment 22 of commissions? 23 A. There is, you know, misunderstanding, 24 yeah. 25 Q. Is it common for sales reps to</p>	<p style="text-align: right;">Page 36</p> <p>1 or, you know, what's happening. It's just that I'm 2 supposed to hold documentation. 3 Q. But you would have been involved in the 4 review of those commissions for whatever sales rep 5 it related to, right? 6 A. I would have handled them. I would have 7 implemented, you know, the situation, yeah. 8 Q. And so you would know who it related to 9 and have knowledge about under what provision the 10 commissions were adjusted, wouldn't you? 11 A. I would say if I'm close enough to that 12 specific branch office or that specific sales team, 13 I would know. But there is, you know, over 3,000 14 people that we have got in North America, so do I 15 know each and every one of them? No. 16 Q. I don't mean to say that. Well, is it 17 common for IBM to conduct a significant 18 transactions review and make an adjustment with a 19 lower commissions paid? 20 A. I would put it this way: It is in the 21 case of the account level inspection, any time we 22 did a -- we had an ELA that was 10 million or 23 greater, we did do an account level inspection. 24 Did we go through and adjust anyone within that -- 25 within each and every one of them? No. There were</p>
<p style="text-align: right;">Page 35</p> <p>1 misunderstand this significant transactions review 2 and the rights that IBM claims to have reserved? 3 MR. BARNES: I'm going to object to 4 that question, but go ahead. 5 BY THE WITNESS: 6 A. The issue was it wasn't really 7 surrounding significant transactions. The 8 questions were about whether or not they were, you 9 know, compensated on a specific set of products or 10 how their -- their, you know, acceleration should 11 be, you know, brought forward. There was a wide 12 range of rationale behind why people were confused; 13 let's put it that way. 14 BY MR. LEE: 15 Q. The lawsuits have all dealt with this 16 significant transactions review and adjustments 17 made under that, right? 18 A. For the four, yes. 19 Q. Okay. And then the three or four others 20 where you received a letter, do those all relate to 21 the significant transactions review and commissions 22 adjusted under that provision? 23 A. Of the letters that I got that says 24 hold, all it says is just hold. It doesn't tell 25 me, you know, the rationale of what they are doing</p>	<p style="text-align: right;">Page 37</p> <p>1 a number of them, of the inspections that we went 2 through and reviewed and released in full. 3 So, I mean, to the point of, you know, 4 the fact that we did a review didn't necessarily 5 mean that automatically it meant that somebody was 6 adjusted. 7 Q. Okay. We have received a spreadsheet 8 from IBM's counsel that identified commissions 9 adjustments from 2013 through 2015. Did you assist 10 in the preparation of the spreadsheet? 11 A. Show me which one you are talking about. 12 MR. LEE: I will mark it and give it 13 to you. 14 (Exhibit 64 was marked for 15 identification, as of 10/19/17.) 16 BY MR. LEE: 17 Q. I am showing you what I have marked as 18 Exhibit 64. 19 A. Okay. This is a spreadsheet that I put 20 together for myself, yes. 21 Q. Okay. When did you put this together? 22 A. I started keeping track of it back in, 23 as you see here, in 2013. 24 Q. Okay. So you didn't -- you didn't 25 create this for this lawsuit?</p>

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Richard Martinotti

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1 A. No.  
 2 Q. Okay. What does this show?  
 3 A. What this shows is it's a summary of  
 4 the ELA transactions that we did go through and  
 5 implemented an account level inspection program on.  
 6 Q. So these are only ELA transactions?  
 7 A. These are ELA or large deal. I want to  
 8 distinct that, because not all of our activity  
 9 here, if it was a large deal, single, you know,  
 10 product, it's not an ELA, but if it is still over  
 11 10 million, we will go and review it.  
 12 Q. Okay. So as we were discussing before,  
 13 of those four different types of review, this would  
 14 be all account level inspection reviews?  
 15 A. Yes.  
 16 Q. Okay. So it's not absolute sales plan  
 17 review, it's not a SaaS business review and it's  
 18 not an out-of-range review, right?  
 19 A. Correct, not this spreadsheet, right.  
 20 Q. Right.  
 21 A. Correct.  
 22 Q. And this, to me, it looks like it is  
 23 organized by account, if I look at the second  
 24 column. Is that correct?  
 25 A. Yes. So, it's summarized by quarter and

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1 then by account and then total revenue of the  
 2 transactional revenue that we recognized, the  
 3 commissions that were calculated against that total  
 4 revenue, any kind of commission holdback that was  
 5 identified or requested, the net commissions that  
 6 were released and then simply the E/R, the expense  
 7 versus the revenue.  
 8 Q. Why did you create this spreadsheet?  
 9 A. I've always -- I would get periodically  
 10 questions about a specific transaction or, you  
 11 know, on average, you know, how many did we do,  
 12 things of that nature, so for ease of use, instead  
 13 of me going and pulling all my paper records, I  
 14 started doing a summary spreadsheet offline.  
 15 Q. Okay. And you said you started in the  
 16 first half of 2013, not before?  
 17 A. Correct. We have been doing this since  
 18 2009.  
 19 Q. I'm sorry?  
 20 A. We have been doing account level  
 21 inspections since 2009.  
 22 Q. Okay. Why was that implemented in 2009,  
 23 if you know?  
 24 A. Just because the ELA activity was --  
 25 that contract was a significant revenue and sales

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1 plan driver starting in 2009, so we wanted to start  
 2 going through and just reviewing and ensuring.  
 3 Q. You said "that contract." What are you  
 4 referring to?  
 5 A. The ELA contract.  
 6 Q. Oh, okay. Was there already an existing  
 7 program for reviewing large deals?  
 8 A. There were different reviews, correct,  
 9 but they were -- they were more done by a given  
 10 region; and what we did back in 2009 was we  
 11 consolidated it at the North America level for, you  
 12 know, a consistency approach.  
 13 Q. And so you didn't start a spreadsheet  
 14 like this in 2009, though; is that your testimony?  
 15 A. Correct, I did not.  
 16 Q. And what sparked it in the first half of  
 17 2013?  
 18 A. Just the fact that, you know, it was one  
 19 more request and it's like, okay, from now on I'm  
 20 going to, you know, make my life easier instead of  
 21 having to continue to go back into all of my  
 22 records.  
 23 Q. Okay. How did you gather this  
 24 information?  
 25 A. By the fact that as I started with the

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1 account level inspections in first quarter, I  
 2 created the spreadsheet, and then as, you know, the  
 3 sales plan, the six-month sales plan goes through,  
 4 you will have first half, second half for a given  
 5 year, then you'll have the following, you know; and  
 6 all I do is copy/paste the -- you know, the  
 7 template over and so that's all this is.  
 8 Q. Okay. Has IBM produced this in any  
 9 other lawsuits?  
 10 A. I don't believe so. This was the first  
 11 time I've provided it to, that I was asked if I had  
 12 it, yeah.  
 13 Q. Has IBM produced the information that's  
 14 on this sheet in another format in any other  
 15 lawsuits?  
 16 A. I -- I don't -- I don't know.  
 17 Q. Is there any information on your  
 18 spreadsheet that's not included on Exhibit 64?  
 19 A. Outside of the redacted names, the  
 20 account names, no.  
 21 Q. Okay. So I went through and I totalled  
 22 up the net holdback commissions. Do you have any  
 23 reason to disagree or dispute that the total of net  
 24 holdback commissions for the first half of 2013 is  
 25 2,793,570 -- I'm going to get that out right -- is

11 (Pages 38 to 41)

Richard Martinotti

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1 \$2,793,575?

2 A. I don't, because there is a 600,000 -- I  
3 would have to add it up myself. There is 400,000  
4 and 600,000, so that in itself is a million, so I  
5 can see where it can be 2 million, over 2 million.

6 Q. And I tried to think of an easy way to  
7 do this, and the best I could come up with was for  
8 me to add it all up. So, I'm only asking if the  
9 number looks right to you. Obviously if I made a  
10 math error or something like that, we can figure  
11 that out. Okay?

12 A. Okay.

13 Q. So for the second half of 2013, do you  
14 have any reason to disagree that the total of net  
15 holdback for that period was \$8,307,299?

16 A. Try that one again. You -- I think  
17 you've missed --

18 MR. BARNES: He said second half of  
19 '13, I think is what he said.

20 THE WITNESS: Oh, second half? I  
21 didn't hear the second half. I heard '13.  
22 Okay.

23 BY MR. LEE:

24 Q. Yeah.

25 A. So, yeah. Well, again, there is 2, 3,

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1 4. There is 4 million right there. 8 million.

2 Q. That's right, 8.3.

3 A. I'll take your word for it. I didn't --  
4 you know, I didn't summarize it, obviously. That's  
5 not something that I was dealing with. But on the  
6 other hand, you know, there is the net commissions  
7 along with the -- the total commissions as well.

8 Q. That information is there too.

9 A. Yeah.

10 Q. I agree. I'm just asking the total of  
11 net holdback, if you have any reason to dispute  
12 that total, 8.3 million.

13 MR. BARNES: Let me just interject.

14 Do you want to -- do you want me to  
15 double-check your math during a break and then  
16 we can just stipulate what the totals are? Do  
17 you think that would be easier? I mean --

18 MR. LEE: Whatever makes you  
19 comfortable. That's my sole purpose, is to  
20 find out what the total is, so however you  
21 guys would feel most comfortable doing that.

22 MR. BARNES: I just think that would  
23 be more efficient than asking Rick to do the  
24 math in his head. I'm happy to total them up  
25 on my end, we can compare the numbers during a

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1 break, and then when we go back on the record  
2 we can...

3 MR. LEE: Let's go off the record.

4 THE VIDEOGRAPHER: Going off the  
5 record at 9:43 a.m.

6 (Discussion was had off the  
7 record.)

8 THE VIDEOGRAPHER: We are back on the  
9 record at 9:49 a.m.

10 BY MR. LEE:

11 Q. So we've just spent some time off the  
12 record making sure that all of my math here is  
13 correct totalling up the column Net Holdback. I  
14 want to start over just so we can make sure it is  
15 cohesive here.

16 So for the first half of 2013, looking  
17 at the first page of Exhibit 64, the total net  
18 holdback -- and that's commissions that were not  
19 paid to sales representatives on this deal,  
20 correct?

21 A. On that specific deal, yes.

22 Q. Okay. So the total commissions that  
23 weren't paid was \$2,793,575, correct?

24 A. Correct.

25 Q. The total commissions that were not paid

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1 in the second half of 2013 is \$8,307,299, correct?

2 A. Correct.

3 Q. And the total commissions that were not  
4 paid in the first half of 2014 is \$4,813,120?

5 A. Correct.

6 MR. BARNES: Total commissions on that  
7 spreadsheet.

8 MR. LEE: Right.

9 MR. BARNES: Right.

10 BY MR. LEE:

11 Q. Okay. And then the total commissions on  
12 the spreadsheet that were not paid for the second  
13 half of 2014 is \$4,930,931, correct?

14 A. Correct.

15 Q. And then the total commissions that were  
16 not paid in the first half of 2015 is \$20,293,476;  
17 is that correct?

18 A. Correct.

19 Q. And that was the period that Bobby  
20 Choplin's commissions were capped; is that correct?

21 A. That was where Bobby Choplin's  
22 commissions were adjusted.

23 Q. Okay. So not capped; that's different?

24 A. I consider that to be adjust- -- being  
25 different. It's not capped. It's adjusted.

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<p>1 Q. Okay. I want to ask you a little bit</p> <p>2 more about that later, but let me go through this.</p> <p>3 A. Okay.</p> <p>4 Q. With this, we got the right period;</p> <p>5 that's the period that has given rise to this</p> <p>6 lawsuit, right?</p> <p>7 MR. BARNES: For the BB&amp;T deal at</p> <p>8 least.</p> <p>9 MR. LEE: Right.</p> <p>10 BY THE WITNESS:</p> <p>11 A. Right, of which there are three</p> <p>12 significant transactions in here that are driving</p> <p>13 that, but BB&amp;T is not the driver of the 20.29 of</p> <p>14 holdback, if that's what you are asking.</p> <p>15 BY MR. LEE:</p> <p>16 Q. Well, which one of these is the BB&amp;T</p> <p>17 deal?</p> <p>18 A. It's highlighted there. It's the fourth</p> <p>19 or fifth one from the bottom. One, two, three,</p> <p>20 four, five and the bottom. Look over to your left.</p> <p>21 Q. Oh, I'm sorry. It actually says "BB&amp;T."</p> <p>22 Okay.</p> <p>23 MR. BARNES: We redacted everything</p> <p>24 but BB&amp;T, so...</p> <p>25 MR. LEE: Got you, got you. I think I</p>	<p>1 elected in its own judgment not to pay these</p> <p>2 commissions to its sales reps, correct?</p> <p>3 A. Correct, because we didn't consider it</p> <p>4 to be correct commissions to be paid, right.</p> <p>5 Q. And the total of that for three years is</p> <p>6 over \$43 million, right?</p> <p>7 A. 43 million 368, yep.</p> <p>8 Q. Okay. That's a significant amount of</p> <p>9 money, isn't it?</p> <p>10 A. But if you turn around and look at how</p> <p>11 much we went and actually released, it's much</p> <p>12 larger. I would say that compared to what we</p> <p>13 actually -- net commission or total commission,</p> <p>14 it's over \$100 million probably.</p> <p>15 Q. Okay. Well, that wasn't my question.</p> <p>16 My question is, is \$43 million a significant amount</p> <p>17 of money to IBM?</p> <p>18 A. We are a \$100 billion corporation, so 43</p> <p>19 million -- 43 million to me is significant, but my</p> <p>20 point is when you say, when you ask me personally</p> <p>21 is 43 million significant, I say "compared to," and</p> <p>22 that's why I keep on saying I would go through and</p> <p>23 say 43 million compared to the total net</p> <p>24 commissions. If the total net commissions is 100</p> <p>25 million or the total commissions was 143 million,</p>
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<p>1 probably just didn't get a color copy or</p> <p>2 something from my office. That's all right.</p> <p>3 Okay.</p> <p>4 THE WITNESS: So of the 20.3, 670 or</p> <p>5 700,000 was attributed to BB&amp;T.</p> <p>6 BY MR. LEE:</p> <p>7 Q. Okay. And I think that was from two</p> <p>8 people, right?</p> <p>9 A. Yes.</p> <p>10 Q. We will go into that more later.</p> <p>11 So in the second half of 2015, the total</p> <p>12 commissions that were not paid is \$2,230,347,</p> <p>13 correct?</p> <p>14 A. Yes, correct.</p> <p>15 Q. And so for that three-year period that's</p> <p>16 shown on Exhibit 64, the total commissions that IBM</p> <p>17 elected not to pay is \$43,368,748; is that correct?</p> <p>18 A. And IBM found issues, anomalies that</p> <p>19 drove us to hold back 43 million 368. That's how I</p> <p>20 would address it.</p> <p>21 Q. Okay.</p> <p>22 A. Okay.</p> <p>23 Q. And I understand that's how you would</p> <p>24 phrase it, that's the -- you are putting the reason</p> <p>25 into your response, but the fact remains that IBM</p>	<p>1 then I would say that, yes, we went through and</p> <p>2 held 43 million but we released still \$100 million</p> <p>3 worth of commissions. You see what I'm saying?</p> <p>4 Q. Well, even under your example, I mean,</p> <p>5 that's almost a third of the money would be held</p> <p>6 back. That's not significant?</p> <p>7 A. But what it's also saying is a third of</p> <p>8 that commissions for whatever reason should not</p> <p>9 have been generated to begin with. The IBM</p> <p>10 management staff through their review determined</p> <p>11 that there was \$43 million worth of commissions in</p> <p>12 a calculated format that had an anomaly that had an</p> <p>13 issue: the wrong quota was there, the wrong</p> <p>14 territory was there, the people that were assigned</p> <p>15 were not the right people that should have been</p> <p>16 assigned, the work contribution wasn't there.</p> <p>17 There is a lot of different reasons. That's why</p> <p>18 the account level inspection program was put into</p> <p>19 play.</p> <p>20 Q. Okay. And you understand you are here</p> <p>21 testifying on behalf of IBM today?</p> <p>22 A. Exactly, and that's why I'm trying to do</p> <p>23 that distinction. From an IBM point of view, IBM</p> <p>24 is going through and looking at, has that</p> <p>25 inspection program in place to go through and say,</p>

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<p style="text-align: right;">Page 50</p> <p>1 okay, I have a significant transaction. In that  2 significant transaction, all I'm trying to do is to  3 ensure that what is calculated should be released.  4 Not every one of the transactions had a  5 holdback, and so consequently, those were reviewed  6 and were determined to be released, so those were  7 fine. There were others that had some form of an  8 anomaly, and because of that anomaly, there was an  9 adjustment that was made. That's me from an IBM  10 point of view.  11 Q. Mr. Martinotti, this is going to be a  12 long day if we don't focus on the question that was  13 asked and answer the question.  14 A. Okay. I'm sorry.  15 MR. LEE: Could you read my question  16 back, please.  17 THE REPORTER: The most previous  18 question was --  19 MR. LEE: Yes.  20 THE REPORTER: -- "Question: Okay.  21 You understand you are here testifying on  22 behalf of IBM today?"  23 MR. BARNES: Which he answered.  24 BY MR. LEE:  25 Q. And your answer to that is what?</p>	<p style="text-align: right;">Page 52</p> <p>1 A. I would say no.  2 Q. But you would agree that \$43 million is  3 significant to the sales representatives who were  4 involved in these deals, right?  5 A. Yes.  6 Q. So the first half of 2015 represents  7 almost half of the commissions held back over these  8 three years. Why is that?  9 A. Let's see. There are three  10 transactions, four transactions that had  11 significant holdback and to the point where it  12 looks like the entire team was held such that it  13 was determined that the entire team was incorrectly  14 being considered for commissions.  15 Q. Which deal was that?  16 A. I -- so there is the 2.3 million against  17 the 3.9, is what I'm looking at; the 4 million  18 against the 4.6 up above, right here. See that?  19 Q. Okay.  20 A. And then there is the 6.5 against the  21 13. The only reasons why we would have that  22 significant of a holdback would -- in my  23 recollection would be the fact that there were  24 significant people that were associated originally  25 to the transaction that were removed because they</p>
<p style="text-align: right;">Page 51</p> <p>1 A. Yes.  2 MR. BARNES: Read his answer back.  3 MR. LEE: Okay. I would rather move  4 on with the day.  5 MR. BARNES: Okay. He said yes, so...  6 MR. LEE: Okay, and then a lot of  7 other stuff, and what I'm trying to do is,  8 let's focus on answering the question; and I  9 am fine with you explaining your answer as  10 much as you feel necessary, but if you could  11 focus on the question that I've asked you, I  12 would appreciate that.  13 BY MR. LEE:  14 Q. So, for IBM, what I'm asking you is, is  15 \$43 million a significant amount of money to IBM?  16 Yes or no.  17 MR. BARNES: Asked and answered. Go  18 ahead.  19 A. As I stated, IBM -- from an IBM  20 perspective, we are a hundred billion dollar  21 corporation. Compare 43 million to a hundred  22 billion dollars. It's money, but it's -- it's  23 compared to a hundred billion dollars. That's IBM.  24 BY MR. LEE:  25 Q. So is that no?</p>	<p style="text-align: right;">Page 53</p> <p>1 were deemed incorrectly assigned or associated, and  2 so it was a false read in the sense of the original  3 commissions.  4 So here is a primary example of why it  5 was important to go through and do the account  6 level inspection. So let's take the 4 million, the  7 4.6 versus the 4.1. There is obviously -- of that,  8 say there were 50 people on that original  9 calculated commission release. It looks like only  10 about two or three people were recognized  11 ultimately to be released and that all the rest of  12 them were -- were held up.  13 And so that's, you know, again my  14 purpose of why I keep on stipulating we are dealing  15 with reviewing the anomalies.  16 Q. Okay. And are you speaking from a  17 specific memory of these transactions?  18 A. No. I'm just looking at, you know, the  19 data that's here right now, and my recollection  20 would be that that would be the -- in my  21 estimation, that would be the reason why that's --  22 that's being reflected that way.  23 Q. Again, and that may or may not be  24 correct?  25 A. Without my going back and researching,</p>

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1 yeah, I don't know.  
 2 Q. Okay. Mr. Martinotti, what did you do  
 3 to prepare for today's deposition?  
 4 A. I reviewed my archives. I sat down with  
 5 legal.  
 6 Q. You reviewed your archives. What did  
 7 that include?  
 8 A. I was asked to go through and review my  
 9 archives and pull whatever information I had on  
 10 this situation, so I did that.  
 11 Q. Did you review any document that has not  
 12 been produced in this litigation?  
 13 A. Not to my knowledge, I mean.  
 14 Q. Okay. Did you speak with anyone aside  
 15 from an attorney?  
 16 A. No.  
 17 Q. Did you speak with any witnesses,  
 18 Tom Batthany, Haleh Maleki, anyone who would have  
 19 personal knowledge of interactions with Bobby  
 20 Choplin?  
 21 A. No.  
 22 MR. BARNES: And you are talking to  
 23 prepare, right, not just generally has he ever  
 24 spoken with them?  
 25

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1 BY MR. LEE:  
 2 Q. Right, to prepare for today.  
 3 A. Oh, I'm -- yeah, correct.  
 4 Q. To be ready to answer questions on  
 5 behalf of IBM, that's what I was referring to.  
 6 A. No. I was instructed not to in that  
 7 sense of the word. I was supposed to keep this  
 8 confidential and only to myself.  
 9 Q. Who instructed you not to?  
 10 MR. BARNES: Let's make sure we don't  
 11 disclose any communications that you've had  
 12 with counsel, so...  
 13 THE WITNESS: Okay. Sorry.  
 14 MR. BARNES: If you can answer that  
 15 question without disclosing attorney-client  
 16 communications, you can go ahead and answer  
 17 it. Otherwise I would instruct you not to  
 18 answer the question.  
 19 THE WITNESS: I will leave it at that.  
 20 BY MR. LEE:  
 21 Q. Okay. So is it your response is you  
 22 cannot answer my question without disclosing or  
 23 potentially disclosing attorney-client privileged  
 24 information?  
 25 A. Correct.

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1 MR. LEE: I'm in a little bit of a  
 2 pickle here because I don't know -- like I  
 3 think I could ask who he met with.  
 4 MR. BARNES: Oh, yeah. No, I don't  
 5 disagree with that. I just --  
 6 MR. LEE: I thought that's what I  
 7 asked. Maybe not.  
 8 MR. BARNES: No. You asked him who  
 9 told you not to...  
 10 MR. LEE: Okay. I get it.  
 11 MR. BARNES: And so that, I don't want  
 12 him talking about what he was told by legal,  
 13 but to the extent he had conversations with  
 14 other people, then I think you can ask him  
 15 that.  
 16 BY MR. LEE:  
 17 Q. Okay. Who did you -- you said sat down  
 18 with legal. Who did you sit down with?  
 19 A. Justin.  
 20 Q. Okay. I don't think this will come up  
 21 again, but if it does, I usually understand this,  
 22 because, of course, there are attorneys who are  
 23 employees of IBM, right? Is that correct?  
 24 A. Correct. I'm --  
 25 Q. That's all right.

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1 A. Yeah. I'm sorry.  
 2 Q. And then I would refer to Justin as  
 3 outside counsel just for, I don't know, ease of  
 4 reference. If when you talk about that you met  
 5 with a lawyer, if it's someone other than outside  
 6 counsel or somebody at Justin's firm, could you  
 7 make that distinction for me?  
 8 A. I can, and in this case all I did, all I  
 9 talked with is Justin.  
 10 Q. Okay. Did you consider contacting  
 11 anyone who had personal knowledge of communications  
 12 with Bobby Choplin to prepare for today?  
 13 A. No.  
 14 Q. Why not?  
 15 A. From past experience in the sense of the  
 16 past depositions, and the -- you know, it's just I  
 17 didn't feel like I should.  
 18 Q. Okay. Would it be fair to say that  
 19 without speaking with Bobby's managers, you  
 20 can't -- you can't be sure of what Bobby Choplin  
 21 was or was not told orally about his compensation?  
 22 MR. BARNES: Hold on, because there  
 23 are multiple ways --  
 24 MR. LEE: Wait. Let's keep it clean.  
 25 If you are objecting and instructing him not

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<p style="text-align: right;">Page 58</p> <p>1 to answer --</p> <p>2 MR. BARNES: Okay. I'm instructing</p> <p>3 witness not disclose any communications he had</p> <p>4 with counsel.</p> <p>5 MR. LEE: Okay. Do you want to read</p> <p>6 my question back, if you don't mind.</p> <p>7 THE REPORTER: Question: "Would it be</p> <p>8 fair to say that without speaking with Bobby's</p> <p>9 managers, you can't -- you can't be sure of</p> <p>10 what Bobby Choplin was or was not told orally</p> <p>11 about his compensation?"</p> <p>12 THE WITNESS: Try that one again.</p> <p>13 Sorry.</p> <p>14 THE REPORTER: Question: "Would it be</p> <p>15 fair to say that without speaking with Bobby's</p> <p>16 managers, you can't -- you can't be sure of</p> <p>17 what Bobby Choplin was or was not told orally</p> <p>18 about his compensation."</p> <p>19 BY THE WITNESS:</p> <p>20 A. Yeah, but I would consider myself to be</p> <p>21 secondary. I mean, wouldn't the -- wouldn't</p> <p>22 Bobby's statement be relevant between Tom and Bobby</p> <p>23 and not Bob -- or Tom telling me in hearsay</p> <p>24 conversation anything in that sense of the word?</p> <p>25</p>	<p style="text-align: right;">Page 60</p> <p>1 A. Okay.</p> <p>2 Q. So that's what you are referring to?</p> <p>3 A. Correct.</p> <p>4 Q. Okay. But you have not read Tom</p> <p>5 Bathany's deposition transcript?</p> <p>6 A. No.</p> <p>7 Q. And you have not read Haleh Maleki's</p> <p>8 deposition transcript?</p> <p>9 A. Correct, I have not.</p> <p>10 Q. And you have not read Bobby Choplin's</p> <p>11 deposition transcript?</p> <p>12 A. Correct, I have not.</p> <p>13 Or there was a document that Bobby, you</p> <p>14 know, again, from here had. I don't know if it was</p> <p>15 a deposition. I don't think it was a deposition.</p> <p>16 It was off of this kind of form, so I read that.</p> <p>17 Q. Okay.</p> <p>18 A. Okay.</p> <p>19 Q. And when you say "that," just for the</p> <p>20 sake of the record, you are saying, "this kind of</p> <p>21 form," you are referring to a document that has a</p> <p>22 caption on it with the case name and the case</p> <p>23 number?</p> <p>24 A. Correct.</p> <p>25 Q. Could that have been the complaint in</p>
<p style="text-align: right;">Page 59</p> <p>1 BY MR. LEE:</p> <p>2 Q. Have you read any deposition transcripts</p> <p>3 for this case?</p> <p>4 A. I read the documents that was given to</p> <p>5 me from Justin.</p> <p>6 Q. Okay. What documents were those?</p> <p>7 A. Just, you know, the --</p> <p>8 MR. BARNES: I can't answer.</p> <p>9 BY THE WITNESS:</p> <p>10 A. No, I agree, but just the regular</p> <p>11 document, just the -- the -- the documents that</p> <p>12 we -- that we found in our archives and you know --</p> <p>13 you know, stuff that you just provided me here.</p> <p>14 BY MR. LEE:</p> <p>15 Q. So like e-mails --</p> <p>16 A. Yes.</p> <p>17 Q. -- that kind of thing and education</p> <p>18 materials that IBM produces?</p> <p>19 A. Right.</p> <p>20 Q. Is that what you are referring to?</p> <p>21 A. Exactly.</p> <p>22 Q. Anything other than those two?</p> <p>23 A. The -- you know, the -- these documents</p> <p>24 (indicating).</p> <p>25 Q. Okay. Those are discovery responses?</p>	<p style="text-align: right;">Page 61</p> <p>1 this lawsuit?</p> <p>2 A. I believe so, yes.</p> <p>3 Q. As you sit here today, do you have any</p> <p>4 knowledge about how Tom Bathany testified</p> <p>5 regarding what he did or did not speak to Bobby</p> <p>6 Choplin about?</p> <p>7 A. Correct, I do not.</p> <p>8 Q. And the same would be true of Haleh</p> <p>9 Maleki?</p> <p>10 A. Correct, I do not.</p> <p>11 Q. Do you know Mark Dorsey?</p> <p>12 A. Yes, I do.</p> <p>13 Q. Have you spoken with him recently?</p> <p>14 A. Not recently.</p> <p>15 Q. When was the last time you spoke with</p> <p>16 him?</p> <p>17 A. Six months ago. He is in a different</p> <p>18 area of the business at this point.</p> <p>19 Q. I think he does not work for IBM any</p> <p>20 more.</p> <p>21 A. Right. I should have put it in that</p> <p>22 frame. I'm sorry.</p> <p>23 Q. No, that's okay, that's okay. I just</p> <p>24 want to make sure we are clear.</p> <p>25 Aside from Mr. Barnes or anyone at his</p>

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<p>1 firm, have you spoken with anybody about Bobby 2 Choplin or this lawsuit? 3 A. No, I have not. 4 Q. Did you conduct any research? 5 A. Just going through my archives as asked. 6 Q. Okay. All right. Will you be good for 7 another 30 minutes? 8 A. I'm fine. 9 Q. Mr. Martinotti, I'm showing you what was 10 marked as Exhibit No. 2. This is Bobby Choplin's 11 incentive plan letter for the first half of 2015; 12 is that correct? 13 A. Yes. 14 Q. And when we have been referring to the 15 incentive plan letter in our conversations earlier 16 today, this is what we're talking about? 17 A. Correct. 18 Q. Now, if you flip to the third page -- 19 first, this is the document that includes Bobby 20 Choplin's quota and his territory, right? 21 A. It has his quota and it has a summary of 22 his territory. 23 Q. Okay. So it doesn't include all the 24 information about his territory? 25 A. It's a summary. In this document we</p>	<p>1 MR. LEE: I don't think it was 2 answered. 3 MR. BARNES: That's fine. We will 4 deal with that later. 5 BY THE WITNESS: 6 A. And I would say yes, and I am saying 7 yes. I -- I expanded by going through and saying 8 this document has all of the information in summary 9 format. In those circumstances whereby there is a 10 length of accounts, we summarized the territory as 11 here and he has a different location that says here 12 is your 500 accounts. 13 BY MR. LEE: 14 Q. Well, accelerators are an important part 15 of a sales representative's compensation, aren't 16 they? 17 A. Um-hmm. I'm sorry. Yes. 18 Q. And accelerators are not included in 19 this document, are they? 20 A. The sales plan number is included in 21 here. The sales plan number refers to the sales 22 plan document that will give you further backup and 23 documentation of the specifics of that sales plan 24 and acceleration. 25 Q. Is that -- the sales plan number is</p>
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<p>1 summarize. He has communicated elsewhere on the 2 specific accounts that he has. 3 Q. So would it be fair to say that a sales 4 representative couldn't rely on this document alone 5 to include all the information that is relevant to 6 their commissions compensation? 7 A. No. This -- this does go through and 8 again in summary format it tells him, you know, his 9 TI, target incentive; his quota; the territory that 10 he is assigned to. But because if he has 500 11 accounts, we are not putting 500 accounts in this 12 document. They summarize it as, you know, the 13 Mid-Atlantic East Region territory. 14 Q. I'm not sure that that answered my 15 question. 16 A. I'm sorry. 17 MR. LEE: Could you read my question 18 back, please. 19 THE REPORTER: Question: "So would it 20 be fair to say that a sales representative 21 couldn't rely on this document alone to 22 include all the information that is relevant 23 to their commissions compensation?" 24 MR. BARNES: I'm going to object, 25 asked and answered. Go ahead.</p>	<p>1 where it says "Plan type/name SW409"? 2 A. Correct. 3 Q. So you would have to go to another 4 document in order to find that information? 5 A. Yes. 6 Q. And if you go to the third page, under 7 General Information, this directs you to your IBM 8 manager to explain the commissions program to a 9 sales representative, doesn't it? 10 A. Yes. 11 Q. And that's referring to the first line 12 manager, in this case, Tom Bathany? 13 A. Correct. 14 Q. And so there is a link there that you 15 could click on to get some more information about 16 the commissions program, right? 17 A. Correct. 18 Q. What would that link take you to? 19 A. That will take you to an education 20 package for the specific sales plans. 21 Q. Would you recognize it if you saw it? 22 A. Yes. 23 Q. I'm going to give you three different 24 documents that were produced to us that I think 25 will fit that description and ask you to confirm</p>

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<p style="text-align: right;">Page 66</p> <p>1 that.</p> <p>2 A. Sure.</p> <p>3 (Exhibit 65 was marked for</p> <p>4 identification, as of 10/19/17.)</p> <p>5 BY MR. LEE:</p> <p>6 Q. The first I've marked as Exhibit 65, and</p> <p>7 on the first page, it's in a PowerPoint style.</p> <p>8 It's dated January 1st, 2015, and it says "Your</p> <p>9 2015 Incentive Plan Individual Quota Plan -</p> <p>10 Employees."</p> <p>11 MR. BARNES: What's this? 65?</p> <p>12 MR. LEE: 65, that's correct. It</p> <p>13 starts with Bates stamp IBM 3725.</p> <p>14 (Exhibit 66 was marked for</p> <p>15 identification, as of 10/19/17.)</p> <p>16 BY MR. LEE:</p> <p>17 Q. I'm also handing you Exhibit 66,</p> <p>18 which has the same basic format. It's entitled</p> <p>19 "Incentives 101." It starts on Bates stamp 3655.</p> <p>20 (Exhibit 67 was marked for</p> <p>21 identification, as of 10/19/17.)</p> <p>22 BY MR. LEE:</p> <p>23 Q. Finally, I'm showing you what I have</p> <p>24 marked as Exhibit 67 which is entitled "2015 sales</p> <p>25 Incentives 1H Incentive Plan Overview - IBM</p>	<p style="text-align: right;">Page 68</p> <p>1 A. Yes.</p> <p>2 Q. Let's look at Exhibit 65 here. If you</p> <p>3 look at Page IBM 3733...</p> <p>4 A. On the right-hand side are the numbers.</p> <p>5 Q. Oh. I can do that too. That's fine,</p> <p>6 Page 9.</p> <p>7 A. 9. So this is out of sync with?</p> <p>8 MR. BARNES: No. It's double-sided,</p> <p>9 so you may --</p> <p>10 THE WITNESS: See, so here is 4, 5,</p> <p>11 then 10, then 8, 9, so it's out of sequence,</p> <p>12 that's all.</p> <p>13 MR. LEE: That's not good.</p> <p>14 MR. BARNES: I think mine looks like</p> <p>15 it's in sequence, so if you want to use this</p> <p>16 one.</p> <p>17 BY MR. LEE:</p> <p>18 Q. You know, they are not all -- they are</p> <p>19 in sequence on the Bates pages, so this is -- let's</p> <p>20 go -- if you'd look at these numbers over here,</p> <p>21 that's probably the more reliable. We will be on</p> <p>22 the same page if we are looking at that.</p> <p>23 A. So which one do you want me to be on?</p> <p>24 9?</p> <p>25 Q. 3733, IBM 3733.</p>
<p style="text-align: right;">Page 67</p> <p>1 Commerce - Software."</p> <p>2 Are these all true and accurate copies</p> <p>3 of what they purport to be?</p> <p>4 A. I would say yes.</p> <p>5 Q. Now, you wouldn't have to click on the</p> <p>6 link from the IPL to get these documents, would</p> <p>7 you, as a sales representative at IBM?</p> <p>8 A. You are saying -- yeah, you don't have</p> <p>9 -- you can get to this website in various ways,</p> <p>10 yes.</p> <p>11 Q. Okay, and one of the other ways in this</p> <p>12 case that we already know about where Bobby Choplin</p> <p>13 could have accessed this information is from</p> <p>14 Exhibit 5, the e-mail from Tom Batthany that</p> <p>15 included a link?</p> <p>16 A. Correct.</p> <p>17 Q. Okay. And these three documents should</p> <p>18 have been accessible from that link to a sales</p> <p>19 representative like Bobby Choplin and including</p> <p>20 Bobby Choplin?</p> <p>21 A. Correct.</p> <p>22 Q. And it would be reasonable for a</p> <p>23 salesperson like Bobby Choplin to rely on the</p> <p>24 information in Exhibit 65, 66 and 67 regarding</p> <p>25 their compensation plan?</p>	<p style="text-align: right;">Page 69</p> <p>1 A. 33, got it.</p> <p>2 Q. So these are -- this is where IBM tells</p> <p>3 the sales rep the highlights of their commissions</p> <p>4 plan?</p> <p>5 A. Correct.</p> <p>6 Q. And there are five bullet points there,</p> <p>7 correct?</p> <p>8 A. Correct. One, two, three, yep.</p> <p>9 Q. One of which is the payout table?</p> <p>10 A. Yes.</p> <p>11 Q. And it notes, you know, the 1 percent</p> <p>12 commission for until you hit your quota and then</p> <p>13 accelerators above that?</p> <p>14 A. Correct.</p> <p>15 Q. And then the last bullet point is</p> <p>16 payments uncapped, correct?</p> <p>17 A. Correct.</p> <p>18 Q. And then the next page -- this is that</p> <p>19 chart that was included in Exhibit 5. Or actually,</p> <p>20 it's two pages over. The chart that was included</p> <p>21 in Exhibit 5 is actually what's on Page 3735, isn't</p> <p>22 it?</p> <p>23 A. No, because -- or that's -- yeah,</p> <p>24 1 point -- yep, yes, it is.</p> <p>25 Q. Okay.</p>

18 (Pages 66 to 69)

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<p>1 A. But that says Page 10.</p> <p>2 Q. I think I can answer that question for</p> <p>3 you with another document. You are looking at the</p> <p>4 page number on the screen caption that was included</p> <p>5 in the e-mail in Exhibit 5 that has --</p> <p>6 A. Right.</p> <p>7 Q. -- a different page number than what's</p> <p>8 on the salesperson's PowerPoint?</p> <p>9 A. Well, yeah. I mean, if you go through</p> <p>10 here, it's Page 11. This is saying Page 10, so</p> <p>11 it's off of a different --</p> <p>12 MR. BARNES: "This" being Exhibit 5?</p> <p>13 THE WITNESS: Yeah. I mean, I believe</p> <p>14 it is the same document. It just is sourced</p> <p>15 from somewhere else, probably.</p> <p>16 BY MR. LEE:</p> <p>17 Q. I want to make sure there is not any</p> <p>18 confusion among us, so let me show you what I have</p> <p>19 marked as Exhibit 3. This is a PowerPoint that</p> <p>20 managers would use to explain the program to their</p> <p>21 sales reps, isn't it?</p> <p>22 A. Correct.</p> <p>23 Q. I suspect if you look at Page 10 there</p> <p>24 you will see that same chart.</p> <p>25 A. No, I get it. But again, like I said,</p>	<p>1 and I think most of us know what that means, but</p> <p>2 that, a 101, is like an entry-level course in</p> <p>3 college, right?</p> <p>4 A. Correct.</p> <p>5 Q. So this is designed to tell sales</p> <p>6 representatives that this is the basic information</p> <p>7 about your plan?</p> <p>8 A. Correct.</p> <p>9 Q. And then Exhibit 67, this is the more</p> <p>10 detailed educational material about the</p> <p>11 compensation plan, right?</p> <p>12 A. For that specific individual, yes.</p> <p>13 Q. Okay.</p> <p>14 A. So, you know, we will have this for each</p> <p>15 and every one of our brands, yes, and Commerce is</p> <p>16 just one of them.</p> <p>17 Q. And if a sales rep wants to learn more</p> <p>18 information about their plan, they can click on</p> <p>19 this link and access Exhibit 67, and this would be</p> <p>20 the most detailed information they could find about</p> <p>21 the plan, right?</p> <p>22 A. Yes.</p> <p>23 Q. And actually, Exhibit 67 includes both</p> <p>24 the first half 2015 as well as the second half</p> <p>25 overview, and just for the sake of the record --</p>
Page 71	Page 73
<p>1 this is Page 11, this is the saying Page 10. I</p> <p>2 don't know why. This is software IOTs, software</p> <p>3 IOTs, 5, 4, yeah. This looks like it's the same.</p> <p>4 I don't know why they have got two different</p> <p>5 documents here.</p> <p>6 Q. Okay.</p> <p>7 A. Do you want to take that back?</p> <p>8 Q. No. Keep that in front of you. We will</p> <p>9 refer to that in just a little -- actually, let me</p> <p>10 just make sure I keep these organized for you.</p> <p>11 MR. BARNES: Do you want mine back?</p> <p>12 MR. LEE: No.</p> <p>13 MR. BARNES: I assume you will be</p> <p>14 using it.</p> <p>15 MR. LEE: Yeah.</p> <p>16 BY MR. LEE:</p> <p>17 Q. All right. So on Page 3735, like we</p> <p>18 went over before with that screen capture, this is</p> <p>19 where it says earnings opportunity remains</p> <p>20 uncapped, right?</p> <p>21 A. I agree.</p> <p>22 Q. And in the Incentives 101, this is</p> <p>23 Exhibit 66.</p> <p>24 A. 66.</p> <p>25 Q. And so it's entitled "Incentives 101"</p>	<p>1 A. Oh. It's buried, so it's --</p> <p>2 Q. Yeah. The first half starts on IBM 3572</p> <p>3 and the second half of the plan starts on 3602.</p> <p>4 A. Yeah.</p> <p>5 Q. Is that correct?</p> <p>6 A. Correct.</p> <p>7 Q. Can you show me where in Exhibit 67 or</p> <p>8 66 or 65 this significant transactions review or</p> <p>9 something like it is discussed?</p> <p>10 A. It's not in any of these sales plans.</p> <p>11 It's only in the incentive of the IPL that I'm</p> <p>12 aware of, significant transaction statement.</p> <p>13 Q. Why not?</p> <p>14 A. I mean, the significant -- the IPL</p> <p>15 disclaimer, it's a disclaimer. This, each of the</p> <p>16 other packages are talking to here is your</p> <p>17 incentives, here is what you're being focused on,</p> <p>18 this is what we are looking to have you focus for</p> <p>19 this sales plan period, and based on that focus,</p> <p>20 you will be compensated in the following fashion,</p> <p>21 you know, be it an IQP, which is high leveraged</p> <p>22 sales plan versus absolute sales plan versus a</p> <p>23 bonus plan versus whatever, you know.</p> <p>24 And in the IPL, the IPL specifically</p> <p>25 talks to here is your sales plan information, that</p>

19 (Pages 70 to 73)



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<p>1 being your target incentive, your base salary, your 2 specific sales plan itself, in this case the 40 -- 3 the SW409 and then the specific disclaimers. 4 It is this IPL that we go through and 5 require our each and every sales individual to 6 review and to sign. We don't -- we don't ask that 7 of the salespeople for the education. The 8 education is for their, you know, purposes. They 9 can read it if they want; they can ignore it if 10 they want. They cannot ignore the IPL, so the IPL 11 is where we have the disclaimers. 12 Q. Why do you say they can't ignore the 13 IPL? 14 A. Because they have to sign this IPL. 15 For them to go through, for the salesperson to 16 establish his, you know, assignment within IBM for 17 that sales plan, he has to sign this IPL on the FMS 18 system, he has to accept it; and by accepting it, 19 he is accepting the information that's in this 20 document, and what this does is it sets up the 21 territory information within the FMS system. 22 Q. But you can't confirm whether any sales 23 representative has read these disclaimers, can you? 24 A. I mean, it -- for the -- for the 25 sales -- the salesperson is instructed to read and</p>	<p>1 where I am at any given time. If they share, if it 2 specifically states that they share it, I don't 3 take the app. You know, those types of situations. 4 So, yes, I do read them personally. 5 Q. Do you do that for your operating 6 system? 7 A. I do that for my operating system 8 because I have to go through; and understand again, 9 you know, Microsoft, just like -- you know, 10 Microsoft is a primary example. You know, I just 11 love it, especially Windows 8 -- or Windows 10, I 12 should say. Now with Katrina, you know, that -- 13 talk about an expansion of privacy or lack of. 14 Microsoft has the ability to go through 15 and to -- if you go through the Katina [as 16 pronounced] process, that will go through and 17 download every, you know, keystroke that you make, 18 and they are keeping tabs of it. I personally do 19 not -- I turned off Katina from the Windows 10 20 personal that I have. 21 Q. Is that something that virtually 22 everyone does, to your knowledge? 23 A. No. 24 Q. Why not? 25 A. Because, you know, they have different</p>
Page 75	Page 77
<p>1 to -- and to accept. I can lead a horse to water. 2 Can I have the horse drink it? I can't do that. 3 Q. Do you know whether it's common practice 4 for sales reps and even managers not to read these 5 IPLs when they accept them? 6 A. I would just say for myself I would want 7 to go through. I read, you know, all of these 8 types of situations on my credit cards and on my -- 9 you know. So, I consider this to be part of the -- 10 you know, if I'm signing it, I'm reading it. 11 That's me personally. 12 Q. I think I see you've got an iPhone over 13 there. Is that right? 14 A. That's an Android. 15 Q. It's an Android, okay. 16 A. Yeah. 17 Q. Have you ever downloaded an update to an 18 app? 19 A. I have, and I've read them. 20 Q. You read the software licensing 21 agreement? 22 A. I do read the software, because to be 23 perfectly blunt, there are -- you know, I am a 24 privacy nut. I don't like, you know, Big Brother, 25 you know, looking over my shoulder, knowing exactly</p>	<p>1 opinions, different approaches. 2 Q. But if they'd read it, wouldn't they? 3 A. Well, I mean, you know, others -- you 4 know, I look at my nieces and my nephews, the 5 Millennials. They like it. You know, they like, 6 you know, going through and having, you know, the 7 system keep tabs of it because they feel that it 8 saves them time. I don't mind going back and 9 looking at, you know, my past purchases. I don't 10 need a machine to tell me what my past purchases 11 were. 12 Q. Okay. But you recognize that you are 13 the exception? 14 A. I might be an anomaly, but that's me 15 personally. You asked me, so... 16 Q. Right. 17 A. Yeah. 18 Q. You would agree that the language here 19 is -- this is legal language, right? Here in this 20 IPL under "Other Important Information," what 21 follows is legal language, right? 22 MR. BARNES: I'm going to object to 23 the extent it calls for a legal conclusion, 24 but... 25</p>

20 (Pages 74 to 77)

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<p style="text-align: right;">Page 78</p> <p>1 BY MR. LEE:</p> <p>2 Q. You can answer.</p> <p>3 A. I -- I wouldn't -- I don't know if by</p> <p>4 legal -- are you saying is it complex? To me, it's</p> <p>5 a very straightforward. It talks to -- you know,</p> <p>6 an incentive plan talks to the rights to modify; it</p> <p>7 talks to, you know, adjustments for errors and it</p> <p>8 explains, you know, in each of those sections. I</p> <p>9 don't think it's legalese in each of those</p> <p>10 sections, but that's me personally.</p> <p>11 Q. Okay. Well, how about IBM? Well, who</p> <p>12 drafted it?</p> <p>13 A. You know, HR and our lawyers, you know,</p> <p>14 would have drafted, you know, all of our, you know,</p> <p>15 sales plans. They would have reviewed them.</p> <p>16 Q. Drafted or reviewed?</p> <p>17 A. They would have -- they would have --</p> <p>18 personally, I believe they review them. I don't</p> <p>19 believe they physically draft them. But, you know,</p> <p>20 I'm not close enough to be able to really tell you</p> <p>21 definitively one way or the other.</p> <p>22 Q. I mean, IBM has a team of lawyers that</p> <p>23 would review this information and draft it and</p> <p>24 develop these incentive plan letters, right?</p> <p>25 MR. BARNES: Asked and answered.</p>	<p style="text-align: right;">Page 80</p> <p>1 significant transaction review has been the source</p> <p>2 of some confusion?</p> <p>3 A. Has been the source of questions.</p> <p>4 Q. Okay. You said confused. You said</p> <p>5 sales representatives were confused and they came</p> <p>6 and talked to you and you helped them understand</p> <p>7 it.</p> <p>8 A. Confused.</p> <p>9 Q. So I guess I'm just going to -- not</p> <p>10 understanding. Would you agree that the</p> <p>11 significant transactions review that you had to</p> <p>12 explain to these representatives was the source of</p> <p>13 some confusion?</p> <p>14 MR. BARNES: Asked and answered.</p> <p>15 BY MR. LEE:</p> <p>16 Q. You can answer.</p> <p>17 A. Yes.</p> <p>18 Q. But you would also agree that IBM has</p> <p>19 not made any efforts to resolve that confusion by</p> <p>20 the materials in Exhibit 65, 66 or 67?</p> <p>21 A. I don't think it has to, because</p> <p>22 again --</p> <p>23 Q. Not my question.</p> <p>24 MR. BARNES: Let him finish his</p> <p>25 answer.</p>
<p style="text-align: right;">Page 79</p> <p>1 BY THE WITNESS:</p> <p>2 A. The answer is yes.</p> <p>3 BY MR. LEE:</p> <p>4 Q. And you would agree with me of course,</p> <p>5 that this significant transaction process has been</p> <p>6 a surprise to some sales reps, right?</p> <p>7 MR. BARNES: Asked and answered.</p> <p>8 A. I don't think of it as a surprise. I</p> <p>9 mean, it's -- it's -- it's in their -- it's in</p> <p>10 their IPL.</p> <p>11 Q. That's not my question.</p> <p>12 A. Okay.</p> <p>13 Q. You are aware that some sales</p> <p>14 representatives have been surprised to learn that</p> <p>15 IBM claims the right to review significant</p> <p>16 transactions, wouldn't you?</p> <p>17 A. No. I don't -- they have been confused</p> <p>18 and after we go through, after I've had</p> <p>19 conversations with them, because I think that's</p> <p>20 where -- I believe that's where you are referring</p> <p>21 to. In my conversations, my personal conversations</p> <p>22 with them, you know, I would go through and, you</p> <p>23 know, highlight the fact that this is what IBM is</p> <p>24 doing and they understand it at that point.</p> <p>25 Q. Okay. So you would agree that this</p>	<p style="text-align: right;">Page 81</p> <p>1 BY MR. LEE:</p> <p>2 Q. Please answer my question and then you</p> <p>3 can explain.</p> <p>4 MR. BARNES: Let him finish his</p> <p>5 answer, and then if you have a followup</p> <p>6 question, you can ask.</p> <p>7 BY MR. LEE:</p> <p>8 Q. You can answer.</p> <p>9 A. Again, I don't consider these documents</p> <p>10 requiring the disclaimers. The IPL is where the</p> <p>11 disclaimers should be and are because the IPL is</p> <p>12 where you have to sign and accept.</p> <p>13 I am not asking an employee to review</p> <p>14 and accept that they reviewed the education</p> <p>15 package. So, is the education package a vehicle</p> <p>16 for communications? Yes. However, it is not a</p> <p>17 vehicle that I am requiring them to document that</p> <p>18 they did read. I am requiring them to read and</p> <p>19 document and accept the IPL.</p> <p>20 MR. LEE: Okay. Could you read back</p> <p>21 my question, please, because I didn't get an</p> <p>22 answer to it.</p> <p>23 THE REPORTER: Question: "But you</p> <p>24 would also agree that IBM has not made any</p> <p>25 efforts to resolve that confusion by the</p>

21 (Pages 78 to 81)



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<p>1 materials in Exhibit 65, 66 or 67?"</p> <p>2 MR. BARNES: Asked and answered.</p> <p>3 MR. LEE: It was not answered.</p> <p>4 MR. BARNES: We can argue about that</p> <p>5 later.</p> <p>6 MR. LEE: I agree.</p> <p>7 BY THE WITNESS:</p> <p>8 A. I still say that I don't believe it's a</p> <p>9 requirement for IBM to go through and clarify</p> <p>10 anything in the education packages.</p> <p>11 BY MR. LEE:</p> <p>12 Q. That's not my question.</p> <p>13 A. So, the answer is no.</p> <p>14 Q. No, you would not agree that IBM has not</p> <p>15 made any efforts to resolve the confusion in</p> <p>16 Exhibits 65, 66 and 67?</p> <p>17 A. No, I don't. I believe that IBM doesn't</p> <p>18 need to make any effort to go through and update</p> <p>19 these three documents.</p> <p>20 Q. Let me make sure that I understand your</p> <p>21 testimony. What you are telling me is IBM has not</p> <p>22 made an effort to resolve the confusion about</p> <p>23 significant transactions in the education packet</p> <p>24 because you don't believe that IBM has an</p> <p>25 obligation to do that?</p>	<p>1 materials; is that correct?</p> <p>2 MR. BARNES: Asked and answered. Go</p> <p>3 ahead.</p> <p>4 BY THE WITNESS:</p> <p>5 A. I think it has. I mean, you know, I</p> <p>6 think it -- it -- it has. I'm just going to say it</p> <p>7 has.</p> <p>8 BY MR. LEE:</p> <p>9 Q. Show me where.</p> <p>10 A. My point is, I consider the disclaimers</p> <p>11 to be relevant for the IPL, and the education</p> <p>12 information that goes and talks to here is your</p> <p>13 sales plan opportunity, capability, is what's in</p> <p>14 the education package.</p> <p>15 Q. I understand. You are telling me that</p> <p>16 the significant transaction policy is included in</p> <p>17 the IPL, correct?</p> <p>18 A. Yes.</p> <p>19 Q. What I'm asking you is, is it included</p> <p>20 or explained or referenced in the education</p> <p>21 materials?</p> <p>22 MR. BARNES: Asked and answered.</p> <p>23 A. The answer is no, and I have said that</p> <p>24 before, yeah.</p> <p>25 Q. Okay. And so by that, you would agree</p>
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<p>1 A. I believe that IBM has answered that</p> <p>2 through the IPL. That's where the documentation,</p> <p>3 in my opinion, belongs and is, because that is what</p> <p>4 IBM requires the employee to sign.</p> <p>5 The IBM is -- IBM is not looking -- IBM</p> <p>6 is using the three documents here as education,</p> <p>7 okay? But, you know, again, in the -- does, you</p> <p>8 know, our -- is this document updated? Yes. It's</p> <p>9 changed and --</p> <p>10 Q. You are looking, you are referring to</p> <p>11 Exhibit 67?</p> <p>12 A. I'm sorry. Yes.</p> <p>13 And we say it in -- in the education</p> <p>14 material that you should always be going back to</p> <p>15 the most current view of the document.</p> <p>16 Q. Of the document?</p> <p>17 A. Of these education documents.</p> <p>18 Q. Okay. And this is dated January 2015?</p> <p>19 A. Yeah.</p> <p>20 Q. So this is the most current as of the</p> <p>21 time that the BB&amp;T deal was in process, right?</p> <p>22 A. I agree, yeah.</p> <p>23 Q. And my question is that IBM has not</p> <p>24 attempted to resolve the confusion about</p> <p>25 significant transactions in the education</p>	<p>1 that IBM hasn't made an effort to resolve any</p> <p>2 confusion about the significant transaction policy</p> <p>3 by these education materials, right?</p> <p>4 MR. BARNES: Asked and answered.</p> <p>5 A. They haven't done anything in the</p> <p>6 education packages, correct.</p> <p>7 Q. And anywhere outside of the IPL, right?</p> <p>8 A. I have conversations.</p> <p>9 Q. And you don't have any evidence that any</p> <p>10 such conversations took place with Bobby Choplin,</p> <p>11 do you?</p> <p>12 MR. BARNES: Objection.</p> <p>13 A. I don't personally, correct.</p> <p>14 Q. Well, you are here on behalf of IBM.</p> <p>15 A. You know, the first line manager, second</p> <p>16 line manager all know the disclaimers. They should</p> <p>17 be going through and explaining that information.</p> <p>18 Do I know personally? Did I verify that each and</p> <p>19 every manager did? No.</p> <p>20 Q. Bobby Choplin's explained that no one</p> <p>21 talked to him about that, and you don't have any</p> <p>22 basis to disagree with that, do you?</p> <p>23 MR. BARNES: Objection,</p> <p>24 mischaracterizes Bobby Choplin's testimony.</p> <p>25</p>

22 (Pages 82 to 85)

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1 BY MR. LEE:  
 2 Q. You can answer.  
 3 MR. LEE: No, it doesn't.  
 4 A. I can't answer it one way or the other.  
 5 Q. Well, my question is whether you have  
 6 any evidence to dispute it.  
 7 A. Personally and as IBM, no. You know, I  
 8 have to go back to Tom and his deposition.  
 9 Q. And the purpose of today was for me to  
 10 be able to ask questions about IBM's position, and  
 11 you understand you had an obligation to be prepared  
 12 to talk about that, right?  
 13 MR. BARNES: Objection.  
 14 BY MR. LEE:  
 15 Q. You can answer.  
 16 A. I don't need to.  
 17 Q. You do.  
 18 A. Oh, do I?  
 19 Q. Yes.  
 20 A. I was prepared based on the information  
 21 that I thought was necessary. I did not speak with  
 22 Tom.  
 23 Q. One of the topics that we had asked you  
 24 to give information about were representations IBM  
 25 made to Bobby Choplin about the sales commissions

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1 program; wouldn't you agree?  
 2 A. Yeah.  
 3 Q. Okay. But you did not make any effort  
 4 to discuss what representations either Haleh Maleki  
 5 or Tom Batthany made to Bobby Choplin about his  
 6 sales commissions before today, have you?  
 7 MR. BARNES: Do not disclose any  
 8 communications with counsel in answering the  
 9 question.  
 10 A. And I'm saying I did not talk to Tom.  
 11 Q. And I'm asking what efforts you made,  
 12 not what conversations you had with Mr. Barnes.  
 13 A. But that's my point. I as the IBM  
 14 representative, I did not go to Tom.  
 15 Q. Okay. I would like to show you another  
 16 series of exhibits.  
 17 MR. BARNES: Could we take a break  
 18 whenever is good for you?  
 19 MR. LEE: Now is good.  
 20 THE VIDEOGRAPHER: Going off the  
 21 record at 10:45 a.m.  
 22 (Recess taken, 10:45 - 10:54 a.m.)  
 23 THE VIDEOGRAPHER: Beginning Disk 2.  
 24 We are back on the record at 10:54 a.m.  
 25 (Exhibits 68 and 69 were marked for

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1 identification, as of 10/19/17.)  
 2 BY MR. LEE:  
 3 Q. All right, Mr. Martinotti. I'm going to  
 4 show you a series of exhibits here.  
 5 A. Okay.  
 6 Q. First what I have marked as Exhibit 68,  
 7 second what I have as Exhibit 69, and then third,  
 8 what we have previously marked as Exhibit 3, which  
 9 we have discussed briefly already today.  
 10 So we talked earlier about some  
 11 materials that managers are given to help them  
 12 explain the compensation plan and commission  
 13 structure to their sales reps. Are these three  
 14 exhibits, 68, 69 and Exhibit 3, the materials that  
 15 managers are given in order to do that?  
 16 A. Yes.  
 17 Q. Exhibit 68 was what was given to  
 18 managers like Tom Batthany in 2013 -- strike that.  
 19 Exhibit 68 was the material given to Tom  
 20 Batthany in 2013; Exhibit 69 is the material given  
 21 to Bobby's manager in 2014; and Exhibit 3 is the  
 22 material given to Tom Batthany in 2015; right?  
 23 A. Correct.  
 24 Q. And as with the other educational  
 25 materials we discussed, these don't say anything

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1 about the significant transaction reviewed today?  
 2 A. They do not.  
 3 Q. They don't attempt to explain it or  
 4 provide any education for managers for how they  
 5 should explain it to sales reps, right?  
 6 A. Correct. That's not in here.  
 7 Q. And what these do include, as with the  
 8 sales rep materials, they include the same  
 9 references to payments uncapped and earnings  
 10 opportunity remains uncapped, correct?  
 11 A. Correct.  
 12 Q. Each of these three do that, don't they?  
 13 A. Yes, they do.  
 14 (Exhibit 70 was marked for  
 15 identification, as of 10/19/17.)  
 16 BY MR. LEE:  
 17 Q. I'm also showing you a copy of what I  
 18 have marked as Exhibit 70. This is a PowerPoint  
 19 program for 2015 that is designed to assist  
 20 managers in understanding the incentive plan and  
 21 explaining it to sales representatives, correct?  
 22 A. Correct.  
 23 Q. Okay. So this is just another part of  
 24 the materials that we went over just a moment ago,  
 25 Exhibit 68, 69 and Exhibit 3. You would look at

23 (Pages 86 to 89)

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<p style="text-align: right;">Page 90</p> <p>1 Exhibit 70 as well, and that would form all of the</p> <p>2 materials that managers are given to help them</p> <p>3 explain the compensation plan to sales reps?</p> <p>4 A. Correct.</p> <p>5 Q. And can you point anywhere on Exhibit 70</p> <p>6 where it discusses the significant transactions</p> <p>7 review policy or it gives any guidance for the</p> <p>8 manager on how to explain that to their sales rep?</p> <p>9 A. Well, if you go to Page 676, it talks to</p> <p>10 the review processes and the review statements.</p> <p>11 Q. 676? Where is that?</p> <p>12 A. So, you know, as we are going through</p> <p>13 and assessing individuals, there is review</p> <p>14 incentive statements, there is review, the data</p> <p>15 assessed for the performance and incremental</p> <p>16 incentives.</p> <p>17 Q. Can you tell me -- these have numbers on</p> <p>18 them. Would you --</p> <p>19 A. Oh, I'm sorry. 13 and 17. Those are</p> <p>20 review situations, reviews, setup, review and</p> <p>21 approve -- oh, that's pools.</p> <p>22 Q. So 13 and 17?</p> <p>23 A. Let's just strike this. This whole page</p> <p>24 is the pool, so it wouldn't be relevant to the --</p> <p>25 to the high leverage sales plan.</p>	<p style="text-align: right;">Page 92</p> <p>1 whether or how they should discuss the large</p> <p>2 transaction or significant transaction review</p> <p>3 process with sales reps?</p> <p>4 A. Correct, it doesn't.</p> <p>5 Q. You are aware that the complaint in this</p> <p>6 action references a 2015 sales kickoff meeting, are</p> <p>7 you not?</p> <p>8 A. Yes.</p> <p>9 Q. And are you prepared to discuss that</p> <p>10 meeting today?</p> <p>11 A. I believe so, yes.</p> <p>12 Q. What is a sales kickoff meeting?</p> <p>13 A. It's a rally, so to speak, to get the</p> <p>14 sales organization motivated and up to speed on</p> <p>15 the, you know, the current focus; the current, you</p> <p>16 know, business priorities.</p> <p>17 Q. Okay. And part of what's discussed at</p> <p>18 those sales kickoff meetings is the compensation</p> <p>19 plan for the coming period, right?</p> <p>20 A. Correct.</p> <p>21 Q. And is part of the goal with discussing</p> <p>22 compensation plan to motivate the sales reps to go</p> <p>23 out and sell as much as they can?</p> <p>24 A. Yes.</p> <p>25 Q. And an effective way to do that is to</p>
<p style="text-align: right;">Page 91</p> <p>1 So, on Page 360 -- or 380, you know, the</p> <p>2 first bullet highlights, "For incentive function,</p> <p>3 the sales manager is required to review their</p> <p>4 employee's earnings. That can be done by reviewing</p> <p>5 their incentive statements for Cognos earnings</p> <p>6 reports," and they are reviewing for reasonable</p> <p>7 accuracy, you know, so the next bullet talks to,</p> <p>8 you know, what you are reviewing.</p> <p>9 Q. But that doesn't have anything to do</p> <p>10 with how they talk to their sales reps and explain</p> <p>11 the compensation plan, does it?</p> <p>12 A. No. This is just -- again, what you are</p> <p>13 asking, this, in this document 70 is instructions</p> <p>14 for the managers.</p> <p>15 Q. Okay.</p> <p>16 A. And so in the instruction for the</p> <p>17 managers this page talks to, you know, you should</p> <p>18 be reviewing and assessing.</p> <p>19 Q. But it doesn't say you should talk to</p> <p>20 your sales representatives about this process and</p> <p>21 how you are going to review and what you are going</p> <p>22 to review or anything like that, does it?</p> <p>23 A. No, it does not.</p> <p>24 Q. So you would agree that Exhibit 70</p> <p>25 doesn't provide any guidance for managers on</p>	<p style="text-align: right;">Page 93</p> <p>1 have sales representatives understand that they can</p> <p>2 make a lot of money, right?</p> <p>3 A. Yes.</p> <p>4 Q. And at this first half of 2015 kickoff</p> <p>5 meeting, that was done, wasn't it?</p> <p>6 A. Yes.</p> <p>7 Q. Sales representatives were told that</p> <p>8 they could make a lot of money under this</p> <p>9 compensation plan, correct?</p> <p>10 A. Yes.</p> <p>11 Q. Were sales representatives also told at</p> <p>12 that meeting that their earnings opportunity was</p> <p>13 uncapped?</p> <p>14 A. Yes.</p> <p>15 (Exhibit 71 was marked for</p> <p>16 identification, as of 10/19/17.)</p> <p>17 BY MR. LEE:</p> <p>18 Q. I will show you what I have marked as</p> <p>19 Exhibit 71. The next three exhibits I'm going to</p> <p>20 show you are PowerPoints that were produced to us</p> <p>21 by IBM that I think were used at that meeting,</p> <p>22 okay, just to give you some context.</p> <p>23 Have you seen this before?</p> <p>24 A. Yes, I have.</p> <p>25 Q. And is this a true and accurate copy of</p>

24 (Pages 90 to 93)

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<p>1 a PowerPoint that was presented at the 2015 first 2 half sales kickoff meeting?</p> <p>3 A. To the best of my recollection, yes.</p> <p>4 Q. And like we discussed, the very first 5 slide after the introduction page on Exhibit 71 is 6 a pile of money?</p> <p>7 A. Yes.</p> <p>8 Q. That's telling the sales reps they can 9 make a lot of money --</p> <p>10 A. Right.</p> <p>11 Q. -- correct, under this compensation 12 plan, right?</p> <p>13 A. Under the -- yes, under the high 14 leverage sales plan.</p> <p>15 Q. Okay. And then the next page talks 16 about Software as a Service, SaaS?</p> <p>17 A. SaaS, correct.</p> <p>18 Q. And the elements of -- strike that -- 19 the accelerators for SaaS sales, correct?</p> <p>20 A. Correct.</p> <p>21 (Exhibit 72 was marked for 22 identification, as of 10/19/17.)</p> <p>23 BY MR. LEE:</p> <p>24 Q. Next I'm showing you Exhibit 72. Is 25 this a true and accurate copy of a PowerPoint that</p>	<p>1 could have been at that meeting make a million 2 dollars in 2015?</p> <p>3 A. In 2015 versus 2014? I mean, I would 4 have to go back and look. The answer would be yes, 5 I know that people did in 2015 earn over a million 6 dollars.</p> <p>7 Q. Do you know who?</p> <p>8 A. I would have to go and query the system, 9 the incentive system.</p> <p>10 Q. Okay. Would that be difficult to do?</p> <p>11 A. It's probably in archives at this point, 12 so it will take us time.</p> <p>13 Q. Would you take me through the process. 14 What would you do to go through and find that 15 information?</p> <p>16 A. We tend to go through and keep -- 17 because of the volume of the records, we tend to go 18 and keep only the current year plus one on our, you 19 know, direct systems, our productive systems, and 20 then anything past is put into archives; and what 21 that would mean is all that's on tape, it's on 22 storage.</p> <p>23 Q. Okay.</p> <p>24 A. And we would have to go and pull those 25 records, load them onto our system and then be able</p>
Page 95	Page 97
<p>1 was presented at the first half of 2015 sales 2 kickoff meeting?</p> <p>3 A. Yes, I believe so.</p> <p>4 Q. And here if you look at Page IBM 4033. 5 Well, first, this presentation was 6 called "Why does it pay to care?"</p> <p>7 A. Right.</p> <p>8 Q. So this presentation was designed to 9 tell sales representatives if they focus on sales 10 this period, they can get paid a lot of money?</p> <p>11 A. Correct.</p> <p>12 Q. And it talks about the accelerators and 13 as they relate to SaaS once again on IBM 4033, 14 correct?</p> <p>15 A. So where is 4033? It's further back. 16 Yes.</p> <p>17 Q. And the sales reps at that meeting were 18 told they could make a million dollars, weren't 19 they?</p> <p>20 A. Yeah.</p> <p>21 Q. Do you know who said that?</p> <p>22 A. I don't recall offhand. I think it's 23 Rohrer or Janet. No, I don't recall.</p> <p>24 Q. Did any sales rep at IBM make a million 25 dollars, any sales rep who was at that meeting or</p>	<p>1 to query the data, but that's the process.</p> <p>2 Q. How long do you think that would take?</p> <p>3 A. Probably a couple of weeks. We would 4 have to find everything, all the data, and then, 5 you know, be able to schedule the run and, you 6 know, that type of situation.</p> <p>7 Q. Is that something that IBM does 8 regularly, is search its archives for information?</p> <p>9 A. We don't necessarily -- I mean, we tend 10 not to have to go to our archives that I'm aware 11 of. You know, our need is normally simply the 12 current year plus one, so that's why it's, you 13 know, that's -- you know, that's why we have that 14 on our systems.</p> <p>15 Q. How do you -- would you agree that you 16 are speculating to a degree that someone made a 17 million dollars in 2015?</p> <p>18 A. I've heard that we've had people over a 19 million dollars, yes.</p> <p>20 Q. Okay. Who did you hear that from?</p> <p>21 A. Just because of my being part of the 22 compensation, you know, organization.</p> <p>23 Q. Okay. And that just strikes a 24 familiar --</p> <p>25 A. Yeah.</p>

25 (Pages 94 to 97)

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1 Q. -- chord in your brain that you heard  
2 that at some point that somebody made a million  
3 dollars?

4 A. Yes.

5 Q. Is that something that's like  
6 celebrated? Is there a specific award or something  
7 like that?

8 A. Yeah. I mean, people, you know, make  
9 note of it and, you know, we've gone through and,  
10 you know, you've got different awards and, you  
11 know, different recognition.

12 Q. Okay, okay.

13 (Exhibit 73 was marked for  
14 identification, as of 10/19/17.)

15 BY MR. LEE:

16 Q. I'm going to show you what I have marked  
17 as Exhibit 73. Is this a true and accurate copy of  
18 a PowerPoint that was presented at the 2015 first  
19 half sales kickoff meeting?

20 A. I believe so, yes.

21 Q. This again is part of the "Why does it  
22 pay to care?", again trying to motivate sales reps  
23 as much as possible by telling them they can make  
24 as much money as their sales warrant, right?

25 A. Correct. Where the business is, where

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1 the business has been, that type of, yes.

2 Q. Okay. And then if you look at  
3 Page 3991, it says, the title of this is, "Why you  
4 should care. Payments is different." It says, "I  
5 will bring you the deals," and it's citing I think  
6 five different deals there, all multimillion, as  
7 high as 30 million. Is that correct?

8 A. Correct.

9 Q. And then under the bullet point below  
10 all those multimillion dollar deals it says, "We  
11 have targets for upgrades that we can't get to,"  
12 and in parentheses, what does it say there?

13 A. "Yes, you get paid."

14 Q. And the next bullet point says, "We have  
15 a 108 million TCV pipeline for IPS that we need  
16 help closing for 2015." And what does it say in  
17 the parentheses?

18 A. "Yes, you get paid."

19 Q. Is there anything in any of these  
20 PowerPoint presentations or was there anything  
21 discussed at the 2015 kickoff meeting about IBM's  
22 policy of reviewing significant transactions or  
23 large deals?

24 A. No.

25 Q. All right. I want to talk to you about

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1 the BB&T deal and the process of IBM's review of  
2 the commissions that should be paid on that deal.  
3 Okay?

4 A. Okay.

5 Q. So as I understand it, the BB&T deal  
6 closed at the very end of the first half of 2015.  
7 I think it may have even been on June 30th. Is  
8 that your understanding?

9 A. Yes.

10 Q. So all of the commissions for that deal  
11 were processed in the first half of 2015, correct?

12 A. They were dated the first half of 2015.  
13 They were physically processed in August and  
14 September, but yes.

15 Q. I think I understand that distinction,  
16 but I want to be clear that those commissions  
17 applied to the first half of 2015 IPL or  
18 commissions program, right?

19 A. Yes, yes.

20 (Exhibit 74 was marked for  
21 identification, as of 10/19/17.)

22 BY MR. LEE:

23 Q. I'm showing you what I have marked as  
24 Exhibit 74. This is an e-mail you sent to a bunch  
25 of people at IBM on July 10th, 2015; is that

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1 correct?

2 A. Correct.

3 Q. Is this a true and accurate copy of that  
4 e-mail?

5 A. Yes.

6 Q. And you've seen this before?

7 A. Yes.

8 Q. Is some of the language here language  
9 that you use commonly on these kinds of reviews?  
10 Like to me, it looked like the first paragraph may  
11 be something that you have used before; is that  
12 correct?

13 A. Yes.

14 Q. Okay. Where does this e-mail begin with  
15 language that applies specifically to this deal and  
16 this review? Does that make sense?

17 A. But it says right at the very beginning,  
18 "Part of our continued responsibility as senior  
19 managers is to coordinate the high attainment  
20 management review process within our region/geo."  
21 That's what this says.

22 Q. I think my question was confusing.

23 A. And it's -- and it's -- and it's -- the  
24 subject is the management inspection package, so  
25 it's the accounting management inspection, so it

26 (Pages 98 to 101)



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<p style="text-align: right;">Page 102</p> <p>1 refers to the fact that it is the account level 2 management inspection. 3 Q. I think my question was confusing. 4 A. Okay. 5 Q. I know there are things in my job that 6 I do a lot and that apply to a lot of different 7 cases, and then I will edit those to apply to a 8 specific case. 9 It struck me as this e-mail may be an 10 e-mail that you sent when you begin a review of a 11 large deal and then you edit the same language to 12 apply to the specific deal that you are reviewing; 13 is that correct? 14 A. Correct. This is kind of -- I use this 15 as a boilerplate for the account level inspection 16 and then insert on the second page the spreadsheet 17 and the relative information of the specific 18 account that we're -- that I'm asking to be 19 reviewed. 20 Q. Okay. So, it looks to me as though the 21 boilerplate language starts at the beginning and is 22 boilerplate for the whole first page and continues 23 down to the line that says, "The E/R proposed 24 compensation release for this package is," and then 25 the first unique information is that chart on the</p>	<p style="text-align: right;">Page 104</p> <p>1 point John Dunderdale put that together. 2 Q. What is the average guideline in North 3 America for deals you review? 4 A. As I said, it starts with 10 percent, 5 and it can go anywhere above 10 percent or less 6 than 10 percent, but we use 10 percent as our 7 starting point. 8 Q. Okay. And that's where it stayed with 9 the BB&amp;T deal, right? 10 A. Actually, if I go back to our 11 spreadsheet... 12 Q. You know, I don't want to make you dig. 13 A. It's right here. 14 Q. Oh, yeah. Okay. 15 A. Oh, actually, I have to take that back. 16 It's right here. No. That's prior to us 17 adjusting. 18 So, we adjusted it to an E/R of 9.93, so 19 it's just slightly under 10 percent. 20 Q. So you could have left it at 13.34 21 percent but decided to adjust down to just under 22 10 percent? 23 A. The management team found anomalies, and 24 so with that, they adjust it. 25 Q. Okay. And who made the decision that</p>
<p style="text-align: right;">Page 103</p> <p>1 second page. Is that correct? 2 A. Correct. 3 Q. And then you insert the ER percentage 4 range for this deal, correct? 5 A. Correct. 6 Q. And then the next language is 7 boilerplate. With the line beginning "In this 8 case," that's unique to this review, correct? 9 A. Correct. 10 Q. And then after that sentence, the 11 remainder of the e-mail is boilerplate, right? 12 A. Correct. 13 Q. What is E/R? 14 A. Expense to revenue. 15 Q. Okay. So that's -- is that a budget 16 that's set with every deal? 17 A. No. It's just a -- what we use as a 18 guideline as to how much expense we expect out of a 19 commission package. 20 Q. When is that set? 21 A. It's not set. It's -- it's a guideline 22 that we use internally. We used in North America 23 as a starting point what we consider to be, you 24 know, an average or a rule stick for our management 25 team as a guideline. We, Scott, myself and at that</p>	<p style="text-align: right;">Page 105</p> <p>1 the E/R percentage should be in the range of 10 2 percent? 3 A. As I mentioned earlier, it was myself, 4 Scott and John Dunderdale. 5 Q. Okay. 6 A. We did that as a rule stick. It's just 7 a starting point. 8 Q. Okay. So this was an established 9 practice before you sent this e-mail? 10 A. Correct. 11 Q. And so that's a starting point. You go 12 through and review, and like you said, it could be 13 higher or lower, but you are starting with every 14 deal at 10 percent? 15 A. We are starting, yes, and that's part of 16 the boilerplate. But as you recognize in the 17 spreadsheet, you will see that we have a number of 18 spread -- of transactions that even start below 10 19 percent. So, again, it's a guide. 20 Q. All right. Let's go to the first page. 21 Part of the boilerplate language reads, "As has 22 always been the case, the process is not intended 23 to cap, but rather ensure that payments are 24 commensurate with the contribution of the rep and 25 that there are no anomalies in quota or territory</p>

27 (Pages 102 to 105)

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1 that could have caused an inappropriate payment  
2 and/or result in recoveries after the fact."

3 Did I read that correctly?

4 A. Correct.

5 Q. Okay. So, you said earlier -- you  
6 corrected me when I used the term "cap," that this  
7 is not a cap, it's an adjustment; right?

8 A. Correct.

9 Q. What's the difference?

10 A. The capping to me is I'm just  
11 arbitrarily going through and putting somebody at  
12 500,000 versus 600,000. Adjusting, I'm going  
13 through and identifying some anomaly within that  
14 territory within that setup, within that revenue  
15 recognition that I needed to correct.

16 As I pointed out or as I highlighted in  
17 our earlier, you know, review of the spreadsheets  
18 and when we saw the 20 million in the 2015, you  
19 know, half of them were off of four transactions,  
20 that we adjusted the entire, you know, E to R or  
21 the entire package. That highlights the fact that  
22 there are times that anomalies creep into the  
23 process and need to be corrected, and that's what  
24 this is referring to.

25 Q. Okay. So the reason you feel like this

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1 you know, in the disclaimer talks to here is what  
2 they -- here is what we refer to as a significant  
3 transaction.

4 Q. Have you had anyone at IBM come to you  
5 after an adjustment and say, you know, "IBM capped  
6 me on this deal"?

7 A. And I would go back to them and say that  
8 they didn't cap you; they adjusted you.

9 Q. Okay. So, first, let me -- that has  
10 happened?

11 A. Yes.

12 Q. Okay. So would you agree there is some  
13 confusion about the difference between a cap and an  
14 adjustment of commissions?

15 A. The answer is yes, there is confusion  
16 or, said differently, they use the term  
17 interchangeably incorrectly.

18 Q. Who is "they"?

19 A. The salespeople.

20 Q. Okay, okay. You think -- and managers  
21 too, right?

22 A. Right. Every adjustment they consider  
23 to be a cap, and that's not -- you know, a cap is  
24 not an adjustment and an adjustment is not a cap.

25 Q. Okay. And you personally try to explain

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1 is not a cap but an adjustment is because it  
2 happens to specific deals, not the overall revenue  
3 that a sales representative is working?

4 A. Correct.

5 Q. Okay. Because you would agree that IBM  
6 doesn't have the right to cap a sales rep's  
7 commissions, right?

8 A. Correct.

9 Q. But IBM does have the right to adjust a  
10 sales rep's commission; that's IBM's position,  
11 right?

12 A. IBM has -- in the disclaimer, IBM has  
13 the right to review and adjust, yes.

14 Q. And as long as IBM's adjustments are to  
15 a specific deal and not all deals, IBM's position  
16 is that's not a cap; is that fair to say?

17 A. Yeah.

18 Q. Okay. Is that defined anywhere in the  
19 materials, in the IPL and educational materials, in  
20 the manager's materials, anything, the difference  
21 between cap and adjust?

22 A. I'm trying to think. I mean, there is  
23 not a glossary or a definition that says here is  
24 capping, here is the definition of an adjustment,  
25 no, outside of the fact that the IPLs specifically,

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1 the difference to people when they ask, right?

2 A. Yes.

3 Q. But IBM doesn't try to explain the  
4 difference to people as a part of their policy, do  
5 they?

6 A. IBM through the sales -- the management  
7 team does.

8 Q. What evidence do you have of that?

9 A. We've gone -- you know, our senior  
10 leadership goes through and sends out, you know,  
11 communiques reminding the management team of  
12 inspection programs and things of that nature, and  
13 that, to me, is going through and reminding, you  
14 know, the managers their role of responsibility.

15 Q. Okay. Do they ever used word "cap" in  
16 those materials?

17 A. No.

18 Q. Have you read Tom Bathany's e-mails  
19 after the BB&T commissions were reviewed?

20 A. Yes.

21 Q. Did you see that he considered what had  
22 happened to be a cap of Bobby's commissions?

23 A. I don't consider that -- I don't  
24 remember him saying the word "capping" or anything.

25 Q. Would it make any difference to you if

28 (Pages 106 to 109)



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1 he did?  
 2 A. I would have gone back to Tom and  
 3 corrected him that it's not a capping.  
 4 Q. But you don't recall being on any of  
 5 those e-mails at the time?  
 6 A. No.  
 7 Q. Let's go to the second page of  
 8 Exhibit 74. So, what happened on the BB&T deal, as  
 9 we've discussed, was an account level review,  
 10 correct?  
 11 A. Correct.  
 12 Q. And in an account level review, the  
 13 reasons why commissions would be adjusted is if the  
 14 quota is set incorrectly, if there is an error with  
 15 the quota?  
 16 A. That's one example of where we would do  
 17 adjustments, yes.  
 18 Q. Okay. If the territory was set  
 19 incorrectly?  
 20 A. Correct.  
 21 Q. If the associated commissions generated  
 22 from the posted revenue were not representative of  
 23 the work contribution of the employee?  
 24 A. Correct.  
 25 Q. And then last, is there fairness/balance

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1 between each of the employees within the  
 2 transaction; is that correct?  
 3 A. Correct.  
 4 Q. So of those four, on what basis was --  
 5 were Bobby Choplin's commissions adjusted on the  
 6 BB&T deal?  
 7 A. The work contribution and the balance.  
 8 Q. Okay. Are you sure about that?  
 9 A. That's what I recall from the  
 10 conversations with Randolph at the time, you know,  
 11 when we were doing this.  
 12 Q. Okay.  
 13 A. But again, just for your edification,  
 14 that -- you know, the confirmation for that would  
 15 be Randolph. I will implement what Randolph  
 16 underscored.  
 17 (Exhibit 75 was marked for  
 18 identification, as of 10/19/17.)  
 19 BY MR. LEE:  
 20 Q. Okay. Let me show you what I have  
 21 marked as Exhibit 75. I will mark that page a  
 22 little bit, but feel free to read as much as you  
 23 need to get the context.  
 24 This is a series of e-mails about the  
 25 BB&T account level adjustment in August of 2015; is

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1 that correct?  
 2 A. Correct.  
 3 Q. It's a true and accurate copy of these  
 4 e-mails?  
 5 A. Yes.  
 6 Q. If you look at Page 213, IBM 213, the  
 7 second paragraph of Randolph Moorers e-mail to you  
 8 on August 18th says, "I spoke with their North  
 9 American unit VPs, Sean Flynn and Phil Weintraub,  
 10 and confirmed that both territory and quota  
 11 assignments were accurate and appropriate with  
 12 respect to their peers in the U.S."  
 13 And that's he is saying there, Randolph  
 14 is telling you that Bobby Choplin's quota was  
 15 correct and his territory was correct, right?  
 16 A. Right.  
 17 Q. And the next sentence, "Both Sean  
 18 and Phil recognized that the achievements were  
 19 extraordinary and that an approach that applied  
 20 relative contribution was appropriate."  
 21 That's the end of the sentence, right?  
 22 A. Correct.  
 23 Q. I read that correctly?  
 24 A. Yeah.  
 25 Q. So the basis by which Mr. Moorers

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1 adjusted Mr. Choplin's commissions was relative  
 2 contribution; isn't that correct?  
 3 A. Correct.  
 4 Q. So that wasn't the fairness/balance;  
 5 that's the contribution?  
 6 A. That's the work contribution, yeah.  
 7 Q. And he says, "I propose that Tom be  
 8 assessed at 14 percent and Bobby at 12 percent."  
 9 What does that mean?  
 10 A. I would have to go back to him. I don't  
 11 know what that -- I don't recall what that -- what  
 12 that's referring to.  
 13 Q. Could that be the percentage of the  
 14 revenue he was credited?  
 15 A. No. The revenue that he had was over  
 16 3 million, and that would have been -- no. I don't  
 17 -- I would have to go back and look at what that --  
 18 Q. Okay. What do you need to answer that  
 19 question? I've got some other things. We can go  
 20 back to it, but I can maybe cut to the chase and  
 21 save some time. What would you need to look at in  
 22 order to know?  
 23 A. I would have to look at if he put  
 24 anything else in the master spreadsheet, and the  
 25 master spreadsheet is what he would then go through

29 (Pages 110 to 113)

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1 and communicate to me what that meaning is.

2 In other words, to be honest with you,  
3 what he writes here is all well and good, but  
4 that's more for John Dunderdale and Scott.

5 What I go through and represent here  
6 then is, you know, this spreadsheet, this is the  
7 summary of the high to low, the top 50; and then it  
8 talks to section one is they identified people that  
9 he is going to adjust down; section two is the  
10 capability of identifying people to adjust up; and  
11 category three is just a summary of what he is  
12 doing here. And so the spreadsheet itself would  
13 have provided me the data that, you know, drove the  
14 compensation for him.

15 Q. And so these adjustments of 14 percent  
16 for Tom and 12 percent for Bobby, that was enough  
17 to get Mr. Mooror back down to that 10 percent  
18 commission budget, right?

19 A. It got him to 9.93 percent.

20 Q. So even a little below that?

21 A. Yeah.

22 Q. But he hit that rule of thumb, that  
23 target, that guideline of 10 percent commissions by  
24 making these adjustments to Tom's and Bobby's  
25 commissions?

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1 A. For that specific account, yes.

2 Q. Were any of the sales reps on the BB&T  
3 deal told that there was a commissions budget?

4 A. There isn't a commission budget. All  
5 that is is a guideline.

6 Q. Okay.  
7 (Exhibit 76 was marked for  
8 identification, as of 10/19/17.)

9 BY MR. LEE:

10 Q. I'm going to show you an e-mail that  
11 Randolph Mooror sent about the BB&T and the Labcorp  
12 deal on July 13th, 2015. I have marked it as  
13 Exhibit 76.

14 Okay. Here -- and the Labcorp deal,  
15 because I think we see that referenced, that was  
16 just another big deal that was under review at the  
17 same time as BB&T, right?

18 A. Correct.

19 Q. Here it says, "Need to reduce by  
20 \$650,000. E/R is r 13 percent. Need to reduce by  
21 650,000." Do you see that?

22 A. Correct.

23 Q. And that's in order to hit the 10  
24 percent budget, right?

25 MR. BARNES: Objection. Go ahead.

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1 BY THE WITNESS:

2 A. Yeah, I would have to go back and look.  
3 I would have to do the, you know, the calculations,  
4 to be honest with you, so...

5 BY MR. LEE:

6 Q. So you don't know as you sit here today?

7 A. No.

8 Q. Let's keep going.  
9 (Exhibit 77 was marked for  
10 identification, as of 10/19/17.)

11 BY MR. LEE:

12 Q. I'm showing you what I have marked as  
13 Exhibit 77. It's an e-mail on July 14th, 2015,  
14 between Randolph Mooror and, it looks like, Cleo  
15 Clarke?

16 A. Correct.

17 Q. That was Tom's manager, right, Tom  
18 Stephenson, the other rep who was being reviewed?

19 A. Yes.

20 Q. And here, if you look at the thread --  
21 feel free to take your time -- Randolph Mooror  
22 says, "Cleo, I have no doubt that Tom has worked on  
23 both Labcorp and BB&T. However, we have a serious  
24 problem in that the commissions payout for these  
25 two deals exceed the maximum and all high achievers

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1 including Tom must be reviewed."

2 When he says "exceed the maximum,"  
3 what's he referring to?

4 A. There is no maximum. So, I mean,  
5 outside of the fact that we have, you know, the  
6 guideline of 10 percent, that is not a maximum.

7 Q. Okay. So he is not referring to a  
8 budget, a commissions budget?

9 A. Right, he is not referring to a budget.

10 Q. And you don't know what he is referring  
11 to; is that your testimony?

12 A. Yeah, correct, because we have -- I have  
13 not given him one, Scott had not given him one.

14 Q. Okay.

15 A. The reality of the first half 2015  
16 highlights the fact that we have not, you know,  
17 adjusted people to 10 percent. We have paid people  
18 greater than 10 percent.

19 (Exhibit 78 was marked for  
20 identification, as of 10/19/17.)

21 BY MR. LEE:

22 Q. I'm showing you what I have marked as  
23 Exhibit 78. This looks like it is Cleo Clarke's  
24 response on those issues about Tom's adjustment.  
25 If you look in the middle of the paragraph there,

30 (Pages 114 to 117)

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<p style="text-align: right;">Page 118</p> <p>1 Cleo is telling Randolph how much Tom has done on</p> <p>2 the Labcorp deal. It starts, "The Labcorp deal is</p> <p>3 especially painful because the entire deal was</p> <p>4 based on the work we did" --</p> <p>5 A. Where? Where are we?</p> <p>6 MR. BARNES: Do you have a copy of</p> <p>7 that for me?</p> <p>8 MR. LEE: Didn't I give it to you?</p> <p>9 I'm sorry. Here you go.</p> <p>10 MR. BARNES: This is 71, right? 78?</p> <p>11 MR. LEE: Yep.</p> <p>12 MR. BARNES: Do you have a copy there?</p> <p>13 MR. LEE: Yeah, I do. Thank you.</p> <p>14 Just messed up.</p> <p>15 MR. BARNES: Thanks for highlighting</p> <p>16 it for me.</p> <p>17 MR. LEE: You are welcome.</p> <p>18 THE WITNESS: Now I just found it.</p> <p>19 I thought you said the middle here meant the</p> <p>20 middle of the page --</p> <p>21 MR. LEE: I'm sorry. I was confusing.</p> <p>22 THE WITNESS: -- versus the middle of</p> <p>23 the paragraph.</p> <p>24 BY MR. LEE:</p> <p>25 Q. Here we go. And so Randolph is talking</p>	<p style="text-align: right;">Page 120</p> <p>1 Q. But Mr. Moorner is the one -- is one of</p> <p>2 the people who exercises judgment on these of how</p> <p>3 much or how little to pay in commissions, right?</p> <p>4 A. Yes.</p> <p>5 Q. And so he seems to also be confused</p> <p>6 about the difference between capping and adjusting</p> <p>7 commissions. Is that fair to say?</p> <p>8 A. I wouldn't -- no. I would --</p> <p>9 MR. BARNES: I'm going to object to</p> <p>10 that question, but go ahead.</p> <p>11 BY THE WITNESS:</p> <p>12 A. Yeah. You know, I can't go through and</p> <p>13 read his mind, but, you know, I look at this as he</p> <p>14 is using the word "capping" as a generic term, but</p> <p>15 we are asking him to review both of the packages,</p> <p>16 and he is going through and reviewing the packages,</p> <p>17 and he is engaging all of his individual</p> <p>18 salespeople.</p> <p>19 BY MR. LEE:</p> <p>20 Q. And this -- Cleo is a second line</p> <p>21 manager?</p> <p>22 A. She is a second line Z platform.</p> <p>23 Q. Okay. So she may understand that this</p> <p>24 is a capping kind of a procedure here if her VP</p> <p>25 that she is working with is using that term?</p>
<p style="text-align: right;">Page 119</p> <p>1 to Cleo, and his e-mail at the bottom, "Cleo, I</p> <p>2 have modeled the transactions as discussed. If we</p> <p>3 cap both transaction at 250 percent on both primary</p> <p>4 and secondary we see the following," and then he</p> <p>5 says this is the impact of an adjustment on</p> <p>6 commissions, right?</p> <p>7 And "Total payments for the two</p> <p>8 transactions would be 382,000 versus 972,000,"</p> <p>9 and then it says, "The second employee only has</p> <p>10 PCO2 issues."</p> <p>11 It must be another one being reviewed on</p> <p>12 the Labcorp deal, right?</p> <p>13 A. Probably, yeah.</p> <p>14 Q. And then Randolph Moorner, the VP of</p> <p>15 software, says, "I recommend capping that on</p> <p>16 Labcorp at 250 percent versus 497 percent."</p> <p>17 Did I read that correctly?</p> <p>18 A. Correct.</p> <p>19 Q. So Mr. Moorner here is using the word</p> <p>20 "cap" and "capping," isn't he?</p> <p>21 A. Correct. He is using the word</p> <p>22 "capping."</p> <p>23 Q. Okay. So he is making that mistake that</p> <p>24 you would correct him on, right?</p> <p>25 A. Exactly.</p>	<p style="text-align: right;">Page 121</p> <p>1 A. She is understanding that we are going</p> <p>2 through an account level inspection plan and they</p> <p>3 were looking at the validation and adjustments,</p> <p>4 yeah.</p> <p>5 Q. Okay. So Cleo's response here, she is</p> <p>6 worrying about Tom's reaction to this news about</p> <p>7 how much money he is being reduced; is that right?</p> <p>8 A. Yes.</p> <p>9 Q. And she says, "The Labcorp deal is</p> <p>10 especially painful because the entire deal was</p> <p>11 based on the work we did to get Labcorp to commit</p> <p>12 to Linux on Z as their platform of choice but the</p> <p>13 payout is less than 50 percent of the commission."</p> <p>14 Did I read that correctly?</p> <p>15 A. Yes.</p> <p>16 Q. So she is saying that Tom Stephenson,</p> <p>17 the sales rep, did all the work on that deal. Is</p> <p>18 that your understanding?</p> <p>19 A. She is saying that he was a significant</p> <p>20 contributor, yeah.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

31 (Pages 118 to 121)

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1 MR. BARNES: And let me -- excuse me.  
2 Let me just object that the Labcorp deal is  
3 outside the scope of the 30(b)(6) notice, but  
4 by all means. I just wanted to put that on  
5 the record.

6 MR. LEE: You know, we asked for him  
7 to be ready to talk about documents produced  
8 in discovery, and this is obviously one.

9 MR. BARNES: Sure. I asserted my  
10 objection. I'm not saying you can't ask him  
11 questions. I just asserted the objection.

12 MR. LEE: I just don't want to hear  
13 later like, "Aw, well, he wasn't speaking for  
14 IBM since I objected," but I can keep  
15 proceeding.

16 MR. BARNES: I've asserted my  
17 objection, and we will deal with anything that  
18 comes up down the road.

19 BY MR. LEE:

20 Q. Now, what Ms. Clarke here is saying is  
21 the entire deal was based on the work we did to get  
22 Labcorp to commit, right?

23 A. That's her opinion. Cleo is lobbying  
24 for her sales team. That's why you go through and  
25 look at and bring in the entire senior management

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1 team.

2 In our organization -- and I know I'm  
3 expanding this, but in our organization the  
4 Z organization is an overlay of our direct sales  
5 force, so in essence we have two people for every Z  
6 transaction; and it's always, you know, an  
7 interesting dialogue on who is the one that, you  
8 know, drove it one way or the other.

9 And then on top of that, included in  
10 that situation from an ELA perspective, you have  
11 the software client leader who is the lead lead.  
12 So, you have a number of people going through and  
13 raising their hand and saying, "I'm the one that  
14 was the lead, you know, bringing in, you know, the  
15 transaction."

16 And that's where you go through and as  
17 Randolph, being the senior in the region, to  
18 coordinate all of that, that documentation; and  
19 then if he has issues, he can still then sit down  
20 and coordinate or discuss with John Dunderdale.  
21 John, as the senior executive in North America,  
22 understands and knows the transactions because, you  
23 know, of his position.

24 (Exhibit 79 was marked for  
25 identification, as of 10/19/17.)

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1 BY MR. LEE:

2 Q. Okay. I'm going to show you what I have  
3 marked as Exhibit 79. This is between Sean Flynn  
4 and Randolph Moorero in August of 2015 about the  
5 BB&T deal; is that correct?

6 A. Yes.

7 Q. You have seen this before?

8 A. Yes.

9 Q. It's a true and accurate copy of this  
10 e-mail correspondence?

11 A. Yes.

12 Q. So Mr. Moorero in his e-mail to Sean  
13 Flynn, that's the direct line VP for Bobby Choplin,  
14 right?

15 A. No. The direct line is actually  
16 Randolph Moorero. Sean Flynn is the dotted-line  
17 executive. Sean is the brand executive for North  
18 America for Commerce. So, Tom reports in to Haleh  
19 reports in to Randolph, so --

20 Q. Bobby?

21 A. Bobby, I'm sorry. Well, Bobby to Tom to  
22 Haleh to Randolph.

23 So the sales organization in 2015  
24 reported in to the region. The brand organization,  
25 which is what Bobby was part of under that

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1 organization, is dotted-line to the executive,  
2 which is Sean.

3 Q. Okay. I think I get that. Thank you.

4 So on the back page, this is similar to  
5 the e-mail we discussed where this is the same  
6 chart that you included in your initial e-mail on  
7 this account level review at the very top, right?

8 A. Correct.

9 Q. And then that's the same, E/R percentage  
10 should be in the range of 10 percent, right?

11 A. Correct.

12 Q. Which is not a budget, correct?

13 A. It's not a budget.

14 Q. Okay. And then he is identifying, you  
15 know, some of the numbers about the commissions on  
16 these deals, right?

17 A. Correct. The number of people that were  
18 paid, the number of people less than 10-K; you  
19 know, he is looking at, you know, the dynamics.

20 Q. And then there is a spreadsheet here  
21 about, I guess, the commissions and percentage  
22 quota and all that for people who worked on the  
23 BB&T deal in the middle of the page, right?

24 A. Correct.

25 Q. That's the chart that's under PCOI; is

32 (Pages 122 to 125)

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1 that right?

2 A. Correct.

3 Q. And below that it says, "As you can see,

4 Bobby is at 983 percent" -- and that means percent

5 of his quota, right?

6 A. Correct.

7 Q. -- "and consumes 28 percent of the

8 available commission budget."

9 Do you see that?

10 A. Correct, yep.

11 Q. Okay. So he is using the word "

12 budget" there, but there is not a budget?

13 A. There is not a budget. All he is --

14 what he is referring to is the fact that the

15 bottom-line number is the bottom-line number and

16 that Bobby is consuming 28 percent of the full

17 total commission plan.

18 Q. Okay. I'm showing you what was

19 previously marked as Exhibit No. 24. This is

20 e-mail correspondence between Tom Batthany and Joe

21 Aleardi on August 25th, 2015. Have you seen this

22 before?

23 A. Yes.

24 Q. Okay. And the title of this is "Bobby

25 Choplin Capped Amount," the subject of this e-mail.

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1 Do you see that?

2 A. Um-hmm. Yes, I'm sorry.

3 Q. Is this a true and accurate copy of this

4 e-mail correspondence?

5 A. I believe so.

6 Q. Okay. And here, just at the second

7 sentence of this e-mail, Tom Batthany is saying

8 that he has looked into what the reason was for

9 reducing Bobby Choplin's commission on this deal,

10 and the second sentence says, "The answer I get

11 from Randolph" -- and that's Randolph Moorers,

12 right?

13 A. Yes.

14 Q. "The answer I get from Randolph is the

15 ELA is overfunded."

16 A. Yes. That's what he --

17 Q. Okay. And is that true?

18 A. No. I mean, again, there is no budget

19 from an E to R point of review.

20 Q. Okay. But Randolph Moorers seems to

21 think that there is, doesn't it? Doesn't he,

22 rather?

23 MR. BARNES: Object to that question.

24 Go ahead.

25

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1 BY THE WITNESS:

2 A. Randolph is going through and looking at

3 the 10 percent as a guideline and he is looking at

4 that going forward.

5 BY MR. LEE:

6 Q. Okay. And he keeps referring to it as a

7 budget, but he is just not correct about that?

8 A. It's not a budget, and again, I can

9 validate that through both 2015 first half and

10 2000- -- and all other time periods where we have

11 gone through and released more commissions above

12 and beyond the 10 percent.

13 Q. Okay. So if a jury one day is resolving

14 this issue about whether this was or wasn't a

15 budget, it's your testimony that they should not

16 look to Randolph Moorers's language in these e-mails

17 where he calls it a budget over and over again; is

18 that true?

19 A. Correct. He is using that in a generic

20 terminology.

21 Q. Much like he used the term "cap"?

22 A. Correct.

23 Q. So the jury shouldn't pay attention to

24 Mr. Moorers's words in these e-mails as he is going

25 through this review; is that what you are saying?

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1 A. The jury should ask or Randolph should

2 explain, you know, his meaning behind the budget.

3 He should -- my -- my statement as an IBM

4 representative here is he needs to clarify, you

5 know, his terminology. He is using generic terms,

6 interchanging generic terms, and he needs to be

7 more specific and clear.

8 Q. I mean, Mr. Moorers, I guess, your

9 position would be he was being sloppy with his

10 language, right?

11 A. Yeah.

12 Q. In the second paragraph here, it looks

13 like Tom Batthany may be confused about this budget

14 issue too. He says -- do you see the sentence

15 starting "Paying a rep" in the middle of the second

16 paragraph?

17 A. Yes.

18 Q. It says, "Paying a rep 50 percent of

19 what he was expected, because we are over budget

20 just does not seem fair."

21 Did I read that correctly?

22 A. Yes.

23 Q. And you just disagree with Tom's using

24 that word "budget" and concluding that that was the

25 reason for the adjustment?

33 (Pages 126 to 129)



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1 A. Correct.

2 Q. Because the adjustment here was because  
3 of Bobby's relative contribution, not because the  
4 commissions that resulted were over budget?

5 A. Correct.

6 Q. And when IBM asks the jury to accept  
7 that, IBM is also asking the jury to ignore this  
8 language from IBM vice presidents, IBM managers  
9 where they call this a budget and a reduction  
10 because they were over budget; is that correct?

11 MR. BARNES: Objection.

12 A. I would say they need to clarify; they  
13 would need to go back to Randolph and say -- and  
14 ask him to clarify what his meaning was.

15 (Exhibit 80 was marked for  
16 identification, as of 10/19/17.)

17 BY MR. LEE:

18 Q. I will show you what I have marked as  
19 Exhibit 80. This is e-mail correspondence in  
20 August of 2015 between Randolph Moorer and again  
21 Cleo Clarke. Have you seen this before?

22 A. Yes.

23 Q. And this is a true and accurate copy of  
24 that e-mail correspondence?

25 A. Yes.

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1 Q. Randolph in his e-mail at the very top,  
2 first line, he says, "To be clear," and this is  
3 about -- first let me say, this is about Tom  
4 Stephenson and his commissions on the BB&T and the  
5 Labcorp deal, right?

6 A. This is for Cleo, yes, because Cleo  
7 doesn't have anybody on BB&T.

8 Q. Well, Tom Stephenson was on BB&T, wasn't  
9 he?

10 A. But he wasn't being -- was he being part  
11 of this --

12 Q. He was.

13 A. Okay.

14 Q. I mean, I don't want you to take my word  
15 for it, but if that refreshes your memory.

16 A. Oh, that's right. We did have two  
17 people on BB&T, yep. I apologize.

18 Q. That's okay.

19 All right. So, Randolph's first line  
20 is, "To be clear. We need to ensure we maintain an  
21 affordable expense posture on each transaction and  
22 commissions should account for about 10 percent of  
23 the total deal value."

24 Did I read that correctly?

25 A. Correct.

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1 Q. He continues, "In the case of both the  
2 Labcorp and BB&T transaction the commission expense  
3 far exceeded the allowable range, and therefore  
4 each person was evaluated on a relative  
5 contribution. Tom was evaluated as a high  
6 contributor, along with some others. However,  
7 there was not sufficient budget to allow a full  
8 payout, so reductions had to be made."

9 Did I read that correctly?

10 A. Correct.

11 Q. Okay. But there wasn't a budget?

12 A. There is no budget.

13 Q. Okay. When he says, "Tom was evaluated  
14 as a high contributor along with some others," is  
15 he referring to Bobby Choplin as one of the others  
16 who was evaluated as a high contributor?

17 A. I would have to go back to Randolph and  
18 ask him.

19 Q. There was no question that Bobby Choplin  
20 had put significant work into the BB&T transaction,  
21 was there?

22 A. No.

23 Q. He had contributed a lot of his efforts  
24 as a sales representative for IBM towards making  
25 that sale, right?

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1 A. Right.

2 Q. This was not an occasion where Bobby  
3 Choplin just happened to have that territory and  
4 never called on the account but ended up in the  
5 system as getting credit for a sale; that's not  
6 what happened here, right?

7 A. Correct. However, there was, as  
8 highlighted in Randolph's other correspondence,  
9 there was over 123 people, of which nine people  
10 were significant individuals, and so that's what he  
11 is referring to. You were asking me about --

12 Q. Okay. So you are saying like Bobby  
13 would have been one of the nine high contributors  
14 along with Tom Stephenson and perhaps some others?

15 A. Yeah, yeah.

16 Q. I'm showing you what we have previously  
17 marked as Exhibit 45. Do you recognize this?

18 A. This is his commission statement, "his"  
19 being Bobby Choplin.

20 Q. Okay. So, at the very top it says  
21 "Field Management System." I guess that's the  
22 system where --

23 A. It's the FMS system. That's the  
24 commissions system, yep.

25 Q. Okay. That's something that's available

34 (Pages 130 to 133)

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1 on IBM's system where a sales rep can go and see  
2 what their commissions might be for a given sales  
3 period?

4 A. Yes. He can query the FMS system  
5 through a canned report and pull that information,  
6 and he gets a statement on a monthly basis as well.

7 Q. Okay. And the information here is  
8 accurate?

9 A. It looks it, yeah, I got to believe,  
10 yeah.

11 THE REPORTER: I'm sorry?

12 A. It looks it, but I got to believe, yeah.  
13 I mean, it is.

14 Q. I will also show you what I'm marking as  
15 Exhibit 81.

16 (Exhibit 81 was marked for  
17 identification, as of 10/19/17.)

18 BY MR. LEE:

19 Q. This might help us understand these a  
20 little better. So between Exhibit 81 and Exhibit  
21 45, we can see what Bobby's commissions payments  
22 were for the first half of 2015, correct?

23 A. Correct.

24 Q. And this is after the adjustments were  
25 made for the BB&T deal, correct?

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1 there was a primary and a secondary quota that  
2 Bobby had. The primary related to the BB&T deal.  
3 The secondary did not relate to the BB&T deal,  
4 right?

5 A. Correct.

6 Q. And if you look back -- I think this may  
7 help. If you look back at Exhibit 75, this is  
8 where John Dunderdale approved the payout, the  
9 adjustments on the BB&T deal.

10 A. Okay.

11 Q. And the Page 213, that shows the account  
12 revenue that he was credited with 3.324 million for  
13 that deal; is that correct?

14 A. On what page, did you say?

15 Q. 213.

16 A. Yeah, but this -- oh, there is Bobby.

17 Q. At the bottom there.

18 A. Yeah. 3 million 324.

19 Q. Okay. So that was his revenue credit,  
20 and then we can look back at Exhibit 81, and that  
21 will show us --

22 A. He had more --

23 Q. -- what his commission was from that,  
24 right?

25 A. Well, he had more achievement. This is

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1 A. Correct.

2 Q. And so the revenue that Bobby was  
3 credited on the BB&T deal was what?

4 A. Revenue is not on here. This is simply  
5 the commissions.

6 Q. This is his total commissions for that  
7 period?

8 A. Correct. So what it talks to is --  
9 yeah, this is his commissions.

10 MR. BARNES: And you are talking about  
11 Exhibit 81, just to be clear?

12 THE WITNESS: Correct.

13 MR. LEE: Sorry, yeah.

14 BY MR. LEE:

15 Q. Exhibit 45 is what I'm talking about.

16 A. Oh.

17 Q. I'm sorry. I should have been clear  
18 about that.

19 A. I will go back to this.

20 Where do we have the revenue?

21 So he has got for PCO1 3,971,965. That  
22 was on this specific statement for PCO1. PCO2, a  
23 million 7.

24 Q. Okay. And just for the jury who may not  
25 understand the lingo there, you are talking about

Page 137

1 he has got an achievement record of 3 million 970,  
2 so he has got \$600,000 more achievement on his  
3 commission statement than he does in this  
4 inspection.

5 Q. Okay. So he must have had another deal  
6 that applied to his primary?

7 A. Correct, probably.

8 Q. Maybe a couple deals, who knows.

9 So Bobby's commissions overall on that  
10 primary category were reduced by \$296,569, correct?

11 A. Correct.

12 Q. And how was that determined?

13 A. I would have to go back to Randolph. He  
14 supplies that data in the spreadsheet, and that's  
15 what I implement.

16 Q. What data?

17 A. He supplies the data of the adjustment,  
18 so in the spreadsheet, in this spreadsheet.

19 Q. Okay. So that's just not the full  
20 spreadsheet; there is more information?

21 A. No. There is more information that goes  
22 out here.

23 Q. I wonder if maybe over lunch you could  
24 take a look at that.

25 A. And do what? What do you need me to do?

35 (Pages 134 to 137)



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1 Q. Let me know what -- on what basis Bobby  
2 Choplin's commissions were adjusted.  
3 A. Okay. I will see if I can find  
4 something.  
5 MR. LEE: Now might be a good time.  
6 MR. BARNES: And let me just say that  
7 Exhibit 75 cuts off some of the columns. The  
8 version that was produced has those columns  
9 out to the right, so...  
10 MR. LEE: I'm not saying you didn't  
11 produce the whole spreadsheet. I think that  
12 it was copy and pasted in this e-mail. I  
13 think that's what happened. So, I mean, I'm  
14 not quibbling over that or anything. I just  
15 would like to know what the final word is.  
16 Okay. Do you guys want to go ahead  
17 and take a break, go off the record?  
18 MR. BARNES: Yeah, let's go off the  
19 record.  
20 THE VIDEOGRAPHER: Going off the  
21 record at 12:04 p.m.  
22 (Lunch recess taken,  
23 12:04 - 1:10 p.m.)  
24 AFTERNOON SESSION  
25 THE VIDEOGRAPHER: Beginning Disk 3.

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1 We are back on the record at 1:11 p.m.  
2 BY MR. LEE:  
3 Q. Mr. Martinotti, just coming back from  
4 lunch, I will just remind you that you are still  
5 under oath today.  
6 A. Yes, I do.  
7 Q. Okay. One of the things that we talked  
8 about looking into over lunch was how IBM arrived  
9 at the reduction of Mr. Choplin's BB&T commission.  
10 What's your understanding of how that reduction was  
11 reached?  
12 A. What Randolph does or did was he went  
13 through and filled out the spreadsheet that I gave  
14 him that had the ability to do adjustments of -- of  
15 commissions and revenue. He went through and did  
16 an adjusted number in there.  
17 That's the number that was represented  
18 in the follow-on correspondence from me to John and  
19 to the incentives team. However, I believe the one  
20 area that you are still referring to is the 12  
21 percent. I believe I have a -- I mean, I can get  
22 myself to a 12 percent range. Whether or not  
23 that's really the logic he used, I can't verify it,  
24 is my problem.  
25 Q. Okay. What's your best estimate of how

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1 that was reached?  
2 A. Taking the -- a 12 percent of the  
3 overall commissions spent.  
4 Q. I see. So the overall commissions -- I  
5 guess we could go back to this big sheet here. So  
6 if we look at the overall commissions of 2.624  
7 million, 12 percent of that is roughly -- let's  
8 just do this math, I guess. It's 2,624,822, okay.  
9 That equals, you know, 12 percent of it is  
10 \$314,000.  
11 A. Yeah.  
12 Q. Okay.  
13 A. So whether or not he didn't put the  
14 decimal points in there or that type of deal, I  
15 don't know.  
16 Q. Oh, I see.  
17 MR. BARNES: Which number were you  
18 working off of there, Matt?  
19 MR. LEE: Just the total commissions  
20 on the Exhibit 64.  
21 MR. BARNES: Pre or post reduction?  
22 MR. LEE: Before any reduction was  
23 taken.  
24 MR. BARNES: Okay.  
25

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1 BY MR. LEE:  
2 Q. So that's -- I mean, what it looks like,  
3 from what I'm looking at, is the whole deal was  
4 19,677,000, roughly. Total commissions on that was  
5 \$2,624,000 and some change.  
6 A. Correct.  
7 Q. And the net commissions was 1.954.  
8 So, if you take that 2,624,000,  
9 12 percent of that is like 314,000.  
10 MR. BARNES: Yeah, and -- I don't want  
11 to testify. So, I can clear this up on  
12 redirect if you want me to.  
13 MR. LEE: You can just tell me and I  
14 will ask him.  
15 MR. BARNES: Okay. I think it is 12  
16 percent of the net or 12 percent of the target  
17 10 percent E to R.  
18 MR. LEE: Oh, okay. So it really  
19 would be --  
20 MR. BARNES: For Bobby, and 14 percent  
21 of the target E to R for Tom.  
22 MR. LEE: We will see. So if the 10  
23 percent of the deal, the --  
24 MR. BARNES: It would be 1.967 times  
25 12 percent, gets you to roughly what he was

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<p>1 paid on the deal.</p> <p>2 MR. LEE: That's 236, so that's not</p> <p>3 right, because he was -- Mr. Choplin was paid</p> <p>4 \$348,000. Wait. Let me get this right just</p> <p>5 for the record.</p> <p>6 BY MR. LEE:</p> <p>7 Q. The total commission payout that</p> <p>8 IBM gave to Mr. Choplin for the BB&amp;T deal was</p> <p>9 \$348,487.06; is that correct?</p> <p>10 A. Correct.</p> <p>11 Q. And the amount held back was \$296,569?</p> <p>12 A. Correct.</p> <p>13 Q. And if there had been no holdback, the</p> <p>14 total amount of commissions that Bobby Choplin</p> <p>15 would have been paid is \$645,056.06?</p> <p>16 A. Correct.</p> <p>17 Q. And as you sit here today, you don't</p> <p>18 know how Mr. Moorcr decided that \$296,000 should be</p> <p>19 used?</p> <p>20 A. Well, I know how he presented it in the</p> <p>21 spreadsheet. I don't know how it relates to the 12</p> <p>22 percent.</p> <p>23 Q. Okay. So how did he present it in the</p> <p>24 spreadsheet?</p> <p>25 A. He went -- he does do an adjusted</p>	<p>1 A. Yes.</p> <p>2 Q. -- which looks at the contribution of</p> <p>3 the salesperson to this deal to consider what</p> <p>4 amount of money would be fair to pay them; is that</p> <p>5 fair to say?</p> <p>6 A. Relative to, yes, correct.</p> <p>7 Q. Okay. And the information that IBM</p> <p>8 is using to gauge what contribution a sales</p> <p>9 representative made on a given deal is what's</p> <p>10 provided to IBM by the first line manager, right?</p> <p>11 A. The first line manager, second-line,</p> <p>12 through the line management chain, yeah.</p> <p>13 Q. Okay. Well, so who provided information</p> <p>14 about Bobby Choplin's contribution on the BB&amp;T</p> <p>15 deal?</p> <p>16 A. Tom.</p> <p>17 Q. Okay. Anyone else?</p> <p>18 A. Haleh was part of -- was part of the</p> <p>19 discussion as well.</p> <p>20 Q. That's Bobby's second line manager on</p> <p>21 the account?</p> <p>22 A. Correct.</p> <p>23 Q. Anyone else?</p> <p>24 A. I think for Bobby himself, I think that</p> <p>25 was the two of them, yep.</p>
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<p>1 statement from the -- he was going through and</p> <p>2 looking to pay Bobby at 450 percent of plan, and</p> <p>3 that's what this equates to. So that's what --</p> <p>4 that's what the spreadsheet calculation would be,</p> <p>5 455 percent, 455 percent.</p> <p>6 Q. So he was looking to reduce the</p> <p>7 commissions to whatever would bring it down from</p> <p>8 the -- it was almost a thousand percent of his</p> <p>9 quota that this --</p> <p>10 A. The adjusted, yeah.</p> <p>11 Q. -- achievement represented.</p> <p>12 And he was looking to reduce the</p> <p>13 commissions by an amount of money that would get</p> <p>14 the total commissions paid, the net commissions on</p> <p>15 the BB&amp;T deal to about 10 percent, right?</p> <p>16 A. I would -- I would -- I guess he is</p> <p>17 doing -- well, I shouldn't guess. I just know that</p> <p>18 he went through and came up with that adjustment</p> <p>19 for both Bobby and for Tom, so his background --</p> <p>20 Q. Mr. Martinotti, we are here today to</p> <p>21 discuss how IBM --</p> <p>22 A. I will go through and say yes, yes, to</p> <p>23 get him to 10 percent.</p> <p>24 Q. Okay. And that was using the relative</p> <p>25 contribution approach, right --</p>	<p>1 Q. Okay. So Bobby Choplin, Tom Batthany,</p> <p>2 Haleh Maleki, those are the people who supplied</p> <p>3 information about Bobby's contribution to the BB&amp;T</p> <p>4 deal?</p> <p>5 A. Yes.</p> <p>6 Q. And based on that information, Randolph</p> <p>7 Moorcr went back and adjusted the commissions to</p> <p>8 reflect what he felt was appropriate on this deal;</p> <p>9 is that fair to say?</p> <p>10 A. They send that information in</p> <p>11 conjunction with Randolph understanding the rest of</p> <p>12 the contri- -- the rest of the transaction, yes.</p> <p>13 He then made his assessment.</p> <p>14 Q. Well, what information did Randolph</p> <p>15 Moorcr have about the other sales reps on the deal?</p> <p>16 A. So, this is an ELA once again. Right?</p> <p>17 So once again we are going through and looking at</p> <p>18 this transaction as a whole. This, no one sale</p> <p>19 within the ELA is a unique or separate transaction.</p> <p>20 They are all packaged together as a total.</p> <p>21 So what's being assessed here is the</p> <p>22 total \$19 million plus transaction, of which, you</p> <p>23 know, 3.3 million of it was Commerce, which is</p> <p>24 Bobby.</p> <p>25 Q. My question is -- well, let me back up a</p>

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<p style="text-align: right;">Page 146</p> <p>1 little bit. The materials that we are talking</p> <p>2 about, Bobby Choplin's information, Tom Batthany's</p> <p>3 information and Haleh Maleki's information about</p> <p>4 Bobby's contribution, that was given in writing,</p> <p>5 wasn't it?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. And submitted in writing to</p> <p>8 Randolph Mooror in order for him to make his</p> <p>9 decision, right?</p> <p>10 A. Correct.</p> <p>11 Q. What other information was submitted to</p> <p>12 Mr. Mooror in writing about the other sales</p> <p>13 representatives on the BB&amp;T deal?</p> <p>14 A. It would have been the same assessments</p> <p>15 based on the other participants, the other 123</p> <p>16 people that were part of that ELA.</p> <p>17 Q. It would have been or it was?</p> <p>18 A. He does -- he did -- he went through --</p> <p>19 I can't -- I would have to go back into the</p> <p>20 records. He did go through and review other people</p> <p>21 more than just Bobby.</p> <p>22 Q. Who else did he review?</p> <p>23 A. He reviewed, as it highlights in his</p> <p>24 other correspondence, there was nine people of</p> <p>25 significant commissions.</p>	<p style="text-align: right;">Page 148</p> <p>1 Q. So look at Exhibit 45, please.</p> <p>2 A. 45. Yeah.</p> <p>3 Q. The reduction, the 296,000 reduction</p> <p>4 that's taken on this is categorized as a claim.</p> <p>5 A. Right.</p> <p>6 Q. What does that mean?</p> <p>7 A. It's an adjustment. That's how we go</p> <p>8 through. That's the terminology that we go through</p> <p>9 in the FMS system. We do a claim, a manual</p> <p>10 adjustment claim, and that's how it physically gets</p> <p>11 processed in the FMS system.</p> <p>12 Q. Okay. So when IBM is using its judgment</p> <p>13 and discretion to reduce commissions based on</p> <p>14 relative contribution, it gets categorized as a</p> <p>15 claim and the reduction is taken?</p> <p>16 A. Correct.</p> <p>17 Q. Okay. Was Bobby Choplin ever advised of</p> <p>18 the basis of that reduction?</p> <p>19 A. He was advised by Tom, and we've gone</p> <p>20 through some of the correspondence.</p> <p>21 Q. The reason Tom cited was that Randolph</p> <p>22 Mooror told him IBM was over budget on the deal,</p> <p>23 right?</p> <p>24 A. Yes.</p> <p>25 Q. Do you know how IBM arrived at the</p>
<p style="text-align: right;">Page 147</p> <p>1 Q. And so is it your testimony that</p> <p>2 Mr. Mooror reviewed something in writing regarding</p> <p>3 the contribution of each of those nine sales</p> <p>4 representatives on the BB&amp;T deal?</p> <p>5 A. Yeah.</p> <p>6 Q. And you've seen that?</p> <p>7 A. I have not seen it, but I know that</p> <p>8 that's what he would have done.</p> <p>9 Q. How do you know that?</p> <p>10 A. Just because of his personality.</p> <p>11 Q. Okay. Are you speculating?</p> <p>12 A. Okay, I'm speculating, so I don't know</p> <p>13 for sure.</p> <p>14 Q. Mr. Mooror hasn't told you, "I received</p> <p>15 in writing a statement of the contribution of each</p> <p>16 of these nine sales representatives," has he?</p> <p>17 A. Correct, he has not.</p> <p>18 Q. And in preparation for today, you didn't</p> <p>19 review anything like that, did you?</p> <p>20 A. No, I did not.</p> <p>21 Q. Okay. So as you sit here today, you</p> <p>22 cannot say that Bobby Choplin's contribution to</p> <p>23 the BB&amp;T deal was less than any of those nine</p> <p>24 individuals who were reviewed, can you?</p> <p>25 A. No.</p>	<p style="text-align: right;">Page 149</p> <p>1 revenue credit for Bobby Choplin and the Commerce</p> <p>2 team on the BB&amp;T deal?</p> <p>3 A. How we arrived at it, did you ask?</p> <p>4 Q. Right.</p> <p>5 A. What happens is the -- a dealmaker</p> <p>6 spreadsheet is built which identifies the part</p> <p>7 numbers and the gross versus the discounted value.</p> <p>8 That then is what is used to place an order into</p> <p>9 the system. That order is then what gets invoiced</p> <p>10 or billed, and that is what then is registered on</p> <p>11 our ledger, IBM ledger.</p> <p>12 Q. Have you seen an achievement detail</p> <p>13 report before?</p> <p>14 A. Yeah, yes. I'm sorry. Yeah.</p> <p>15 Q. I'm going to show you what I've marked</p> <p>16 as Exhibit 43.</p> <p>17 MR. LEE: I've only got two of these,</p> <p>18 if you wouldn't mind looking at...</p> <p>19 MR. BARNES: I think I have got it,</p> <p>20 actually. That's 43?</p> <p>21 MR. LEE: That's right.</p> <p>22 BY MR. LEE:</p> <p>23 Q. This is part of IBM's FMS system, isn't</p> <p>24 it?</p> <p>25 A. It is a Cognos report that queries the</p>

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1 FMS system, yes.

2 Q. Okay. And just to put that in plain  
3 English for our jury, this is a report that IBM  
4 employees can use to access information from that  
5 FMS system, right?

6 A. Yes. It's a very robust reporting  
7 process that allows them to go through and query,  
8 yes.

9 Q. Okay. Is the information on this report  
10 accurate?

11 A. I don't -- I don't know, to be honest  
12 with you, because I don't know the premise of how  
13 he created the -- the report. I mean, he's got a  
14 report here. He's got a report that shows \$6.6  
15 million worth of revenue. He's got part numbers  
16 here.

17 What I don't know is whether or not this  
18 is representing the gross transaction or the net  
19 transaction and whether or not this is license,  
20 including the support and subscription or just  
21 license. So, I would really have to go and ask him  
22 how he pulled this report.

23 Q. As you sit here today, can you say that  
24 the information on this report is not accurate?

25 A. If we are saying that this -- well, this

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1 That's all I'm saying.

2 Q. You saw this before today, didn't you?

3 A. Yeah.

4 Q. Did you look at this in preparation for  
5 today?

6 A. I did not go back to query the report  
7 to -- you know, I see the report. I did not go  
8 back and query the report.

9 Q. That's something you could have done?

10 A. 2015, yeah, we would have this on our  
11 system.

12 Q. And it looks like this is all  
13 information related to software from the Commerce  
14 team that was purchased by Branch Banking & Trust,  
15 BB&T, right?

16 A. Correct.

17 Q. And this is the right period, isn't it?

18 A. Aside from there is a 2014 transaction  
19 on here.

20 Q. All right. Just 30,000?

21 A. I get it, but you just asked me the  
22 question.

23 Q. Sure. No, no, no. I want to be  
24 complete. You are doing the right thing. I just  
25 want to make sure it's clear.

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1 is saying that this is BB&T. The revenue  
2 recognition that we have for BB&T for Commerce is  
3 the 3 million 3.3 and this is showing 6.6. So,  
4 this is, like I said, either showing a gross versus  
5 the discounted value, we pay on discount,  
6 discounted value, and/or he could have the support  
7 and subscription which, again, he is not paid on.

8 Q. Okay.

9 A. So whether -- you know, is the 6.6  
10 accurate? It could be accurate if that's what this  
11 report is representing. Right? But I will tell  
12 you, I don't know because he doesn't have his query  
13 here. He doesn't have -- he doesn't show how he  
14 accessed the report.

15 Q. What do you mean? What options would  
16 you have?

17 A. He can go in there and, you know, query  
18 the whole -- you know, he can go gross to net. He  
19 can go license to support and subscription. He can  
20 go through and look at channel content, a whole  
21 number of other, you know, aspects.

22 He needs to query it correctly to -- you  
23 know, if he is looking for the net value to  
24 represent or tie back to his 3.3, he needs to make  
25 sure that he is querying net rather than gross.

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1 A. Yeah.

2 Q. Let me put it this way: This  
3 information could be accurate, but as you sit here  
4 today, you don't know whether it is or isn't?

5 MR. BARNES: Objection, asked and  
6 answered.

7 BY MR. LEE:

8 Q. You can answer.

9 MR. BARNES: Go ahead.

10 A. It could be accurate based on the fact  
11 that this is reflecting gross rather than net.

12 Q. But you don't know that to be the case  
13 either, right?

14 A. Well, I would lean towards that because  
15 the -- the FMS system represents exactly what we  
16 have on the ledger, and the ledger has for his  
17 territory, for his products and for his sales plan  
18 \$3.3, and that's what I do believe. That's what I  
19 do -- I mean, that's what we go and report to the  
20 street. That has to be accurate, and that is a net  
21 value.

22 So, you know, comparing the 3.3 versus  
23 the 6.6, the 6.6 I could assume is either the gross  
24 plus S and S or just gross, but it can represent  
25 the transactions, yes.

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1 Q. Other than IBM's right to review  
2 significant transactions and, in this case, make a  
3 contribution adjustment, are there any other  
4 reasons that IBM relies on to support modification  
5 of Bobby Choplin's commissions payments on the BB&T  
6 deal?

7 A. Is there any other -- try that again.  
8 I'm sorry.

9 MR. LEE: Would you mind reading that  
10 back?

11 THE REPORTER: Question: "Other than  
12 IBM's right to review significant transactions  
13 and, in this case, make a contribution  
14 adjustment, are there any other reasons that  
15 IBM relies on to support modifications of  
16 Bobby Choplin's commission payments on the  
17 BB&T deal?"

18 BY THE WITNESS:

19 A. In this case they are looking at the  
20 contribution. They validated that the territory  
21 was correct and the quota was correct, yeah.

22 BY MR. LEE:

23 Q. So my question is, are there any other  
24 reasons besides that?

25 A. So, that was why I was asking the

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1 question. There would be other reasons. There  
2 would be other -- in the -- in the disclaimer, as I  
3 -- as we talked about, we are looking at, you know,  
4 are we validating the territory, are we validating  
5 the quota, are we validating the contribution. So,  
6 yeah, there is more than just contribution he is  
7 looking at, if that's what you are asking.

8 Q. No, it's not what I'm asking.

9 A. Oh, okay. I'm sorry.

10 Q. I think your answer was more  
11 hypothetical and mine is what was actually done,  
12 what was actually done for Bobby Choplin on this  
13 deal. Are there any other reasons that IBM is  
14 relying on, any other justifications for adjusting  
15 Bobby Choplin's commissions on the BB&T deal?

16 A. And the answer is no.

17 Q. Okay. So IBM is not claiming that Bobby  
18 failed to comply with his IPL, are they?

19 A. Correct, they are not.

20 Q. IBM is not claiming that Bobby failed to  
21 follow some other guideline or policy, is it?

22 A. Correct.

23 Q. And IBM is not alleging any fraud or  
24 misrepresentation or misconduct by Bobby Choplin?

25 A. Correct.

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1 Q. I have seen some information in the  
2 record that the BB&T deal could be as large as  
3 80 to 90 million total. Is that accurate?

4 A. That would be including the support and  
5 subscription, you know, the full package, the full  
6 breadth of the transaction. The 19 million  
7 represents the license.

8 Q. Okay. And so that is the amount that  
9 would apply to the software team; is that correct?

10 A. Correct.

11 Q. Okay. And there was -- that was only  
12 maybe a quarter, 25 percent of the deal, right?

13 A. Correct, yeah.

14 Q. Okay. What was the rest of the deal, do  
15 you know?

16 A. I can't -- it's the support and  
17 subscription. There was some services that were in  
18 there, but the rest of that revenue is not part of  
19 their sales plan. That's why it's not recognized  
20 for them.

21 Q. What does that mean?

22 A. In other words, the sales plan for that,  
23 for Bobby and others is transactional only. We are  
24 paying them to focus on the transactional.  
25 Everything else comes forward.

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1 By selling the transaction, the  
2 importance of selling transactional is we drag the  
3 support and subscription, so that's why we are  
4 focusing on transactional.

5 Q. Okay. Let me make an analogy that I  
6 would understand; I hope somebody else would too.

7 My dad for his career sold pumps, and  
8 when they would sell pumps, they would sell the  
9 pump to a manufacturer and then they would also  
10 service the pump over a, you know, period of time.  
11 Okay?

12 A. Um-hmm.

13 Q. So in that situation what you are saying  
14 is the transactional is the cost of the pump and  
15 selling the pump to the manufacturer, and so it  
16 would include that if the pump cost a hundred  
17 dollars; and then the service package, which may be  
18 another \$200 over five years, that's not included,  
19 right?

20 A. Correct.

21 Q. Okay. So, if the BB&T deal was \$80  
22 million, then roughly 20 million was the software  
23 itself, BB&T purchasing the right to use that  
24 software. The other 60 million of the deal was IBM  
25 servicing that software, maintaining it, keeping it

40 (Pages 154 to 157)



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1 up-to-date and working with any bugs or any  
2 problems that BB&T has over time?

3 A. Correct.

4 MR. LEE: Give me just a second.

5 THE WITNESS: No problem.

6 MR. BARNES: My father-in-law  
7 engineered pumps for his career, so I wonder  
8 if --

9 MR. LEE: Oh, really?

10 MR. BARNES: -- your dad and my  
11 father-in-law met.

12 MR. LEE: Maybe, yeah.

13 MR. BARNES: You said that and my cars  
14 perked up.

15 MR. LEE: I will have to ask you who  
16 he worked for when we are done.

17 BY MR. LEE:

18 Q. Would you agree that caps on commissions  
19 demotivate sales representatives?

20 A. Yes.

21 Q. Is that part of the reason that IBM does  
22 not have caps on commissions?

23 A. Yes.

24 Q. And so having a compensation plan where  
25 commissions are uncapped is designed to motivate

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1 or a monthly rental, essentially, and it's a form  
2 of billing that the customer will come to us and  
3 ask us to build a SaaS environment whereby we will  
4 go through and lease back the licenses and the  
5 support and the subscription of that product, you  
6 know, so that they get it and that they don't have  
7 to carry it as an operating lease.

8 Q. And that was a new product in 2012,  
9 2013?

10 A. Yes.

11 Q. And Bobby Choplin had a great  
12 performance with the Phillips deal in the first  
13 half of 2013; would you agree with that?

14 A. Yes.

15 Q. In fact, I think some of the IBM  
16 executives called him a -- called his performance  
17 on that deal a poster child for high achievement on  
18 a SaaS deal. Would you agree with that?

19 A. He was -- he was lauded, yes.

20 (Exhibit 82 was marked for  
21 identification, as of 10/19/17.)

22 BY MR. LEE:

23 Q. Just so I'm not speaking in  
24 generalities, I show you what I have marked as  
25 Exhibit 82. If you'd look over at Page 4185. I

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1 sales representatives to achieve high sales?

2 A. Yes.

3 Q. All right. I want to talk to you about  
4 the Phillips deal. Do you know what I'm talking  
5 about when I say that?

6 A. It's a SaaS transaction that happened in  
7 2013.

8 Q. Okay. And Bobby Choplin started working  
9 with IBM in late 2012?

10 A. November 2013.

11 Q. November 2012, right?

12 A. '12, yes. I'm sorry. Yeah, '12.

13 Q. In fact, his first commission plan for  
14 IBM was the first half of 2013, wasn't it?

15 A. Correct.

16 Q. And that was the period during which the  
17 Phillips deal closed, wasn't it?

18 A. Yes.

19 Q. And you said that was a SaaS deal,  
20 and we may have already said that, but that's  
21 software --

22 A. Software as a service.

23 Q. Okay. And explain for the jury in  
24 layman's terms what that means.

25 A. It converts our license into an annuity

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1 think it's Page 8 of the exhibit.

2 It's giving an example of what they call  
3 a big win with this Phillips BVA deliverable. It  
4 says, "A poster child win for brand new rep Bobby  
5 Choplin." Do you see that?

6 A. Correct.

7 Q. And have you seen that before?

8 A. To be honest, this specific package, no,  
9 but I've heard of -- yes -- no, I have not seen  
10 this specific one.

11 Q. Did you hear these kinds of --

12 A. Yes. Well, I shouldn't say that before  
13 you've asked your question.

14 MR. BARNES: Yeah, let him finish his  
15 question first.

16 BY MR. LEE:

17 Q. So you had heard these kind of positive  
18 comments about Bob Choplin's performance --

19 A. Yes.

20 Q. -- around the time that he closed that  
21 deal?

22 A. Yes. Just as, you know, I've heard --  
23 it's a common occurrence when a significant  
24 transaction happens. We have a process and a  
25 system in IBM whereby we will go through and

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<p>1 highlight significant transactions just so that 2 others can glean and learn from the -- you know, 3 the activity. 4 Q. And that, IBM figured out deciding to 5 hold back part of Mr. Choplin's commissions on that 6 deal, correct? 7 A. That was a situation whereby his quota 8 was not set correctly, and so consequently they 9 adjusted his earnings due to the quota. 10 Q. So IBM determined that there was an 11 error in the assignment of his quota and corrected 12 that error? 13 A. Correct. 14 Q. Okay. And just the correction of that 15 error alone resulted in a lower commission? 16 A. Resulted in the lower commission, yes. 17 Q. Okay. So there wasn't a cap placed on 18 Bobby's commissions for the Phillips deal? 19 A. That was not a cap, no. 20 Q. Okay. And there wasn't a claim or a 21 reduction made for his relative contribution or 22 anything like that? 23 A. Correct. That was solely Bobby, and 24 that was the quota. 25 Q. So this was not an ELA or an account</p>	<p>1 as Exhibit 83. This is an e-mail from Michael 2 Madsen, September 15th, 2013, and this includes 3 your initial e-mail to the group and then 4 Mr. Madsen's recommendation after reviewing this; 5 is that correct? 6 A. Yes. My note is here behind here, 7 August 14th; and this is September 15th, yes. 8 Q. Is this a true and accurate copy of this 9 e-mail? 10 A. Yes. 11 Q. And if you flip over to the third page, 12 Mr. Madsen came to this -- strike that. 13 Mr. Madsen corrected the quota error -- 14 well, strike that. I'm sorry. Give me one more 15 time. 16 MR. BARNES: Third time is a charm. 17 MR. LEE: That's right, usually. 18 BY MR. LEE: 19 Q. Ms. Surette, Deborah Surette was also 20 involved in this review, correct? 21 A. Correct. 22 Q. And she has an e-mail down here on 23 September 13th, and she has made a recommendation 24 to Mr. Madsen, and her recommendation is that 25 Mr. Choplin's quota should be corrected and brought</p>
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<p>1 level review? 2 A. Correct, it was not. 3 Q. Okay. This was just a deal driven by 4 Bobby Choplin? 5 A. That was simply by Bobby. That was a 6 SaaS review. 7 Q. So this was different than the BB&amp;T 8 review? 9 A. If you go back to, remember, there was 10 the four that we talked about. 11 Q. Right. 12 A. SaaS was one of them. 13 Q. Okay. Since it was a new product, you 14 were reviewing those transactions more frequently 15 to make sure that the commissions were in line with 16 what IBM expected? 17 A. Correct. 18 Q. And in this case, IBM identified the 19 quota error and corrected it and the commissions 20 worked themselves out? 21 A. Correct. 22 (Exhibit 83 was marked for 23 identification, as of 10/19/17.) 24 BY MR. LEE: 25 Q. I'm going to show you what I have marked</p>	<p>1 in line with average SaaS quota in North America; 2 is that correct? 3 A. I'm looking for her note in here. There 4 is Deborah. "Janet and Mark, Attached you will 5 find a workbook containing three things. Current 6 recommendation...." Yeah, okay. I got it. 7 Q. And actually, I said in North America, 8 but it says East IMT. What does that mean? 9 A. That's the region. That's the 10 geographic footprint, so that's state of New York. 11 You know, that's all that is. 12 Q. It's Bobby's region? 13 A. Yeah. 14 Q. Okay. So it looks like there is 66 15 other sales reps in that region. Total quota was 16 11.9 million. I have gone ahead and done the math 17 for us. That equals 180,000 per sales rep, and 18 that's what the adjustment was, right? 19 A. Yes. 20 Q. So the adjustment here was different 21 than what went on in the BB&amp;T deal; that's correct? 22 A. Correct. This is a -- this is a 23 different inspection. It was based on a different 24 rationale, but it was an inspection, yeah. 25 Q. We talked about lawsuits that had been</p>

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1 brought against IBM related to commissions earlier.  
2 I would like to talk more specifically about them.

3 Are you familiar with the salesman by  
4 the name of Niels Jensen?

5 A. No.  
6 (Exhibit 84 was marked for  
7 identification, as of 10/19/17.)

8 BY MR. LEE:

9 Q. I show you what I have marked as  
10 Exhibit 84. This was a IBM sales representative.

11 A. 2000. Oh, he was hired in 2000. Sorry.

12 Q. That's okay. Niels Jensen was a sales  
13 representative for IBM; is that your understanding?

14 MR. BARNES: You can take some time to  
15 read through that if you need to.

16 MR. LEE: As long as you need to.

17 BY THE WITNESS:

18 A. It says here that he was hired in 2000  
19 as a software sales representative, so yes, he is  
20 an IBM employee.

21 BY MR. LEE:

22 Q. Okay. And this lawsuit involved unpaid  
23 commissions?

24 MR. BARNES: Again, you can take the  
25 time to read through this document if you need

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1 to.

2 BY MR. LEE:

3 Q. You can take that as a given any time I  
4 hand you a document. I want you to take your time  
5 and make sure you understand it. Don't answer one  
6 of my questions before you are ready. Okay?

7 A. Got it. And the question was again?

8 Q. That Mr. Jensen sued IBM over unpaid  
9 commissions.

10 A. Yes.

11 Q. Just let me know when you are ready.

12 A. So Jensen is looking for \$2.6 worth of  
13 commissions, is what this is saying.

14 Q. Okay. And Mr. Jensen was claiming that  
15 IBM was bound to pay him commissions under the  
16 commission formula; is that correct?

17 MR. BARNES: And let me just say that  
18 I'm going to object to the extent that this is  
19 asking about facts that aren't in evidence and  
20 to the extent that you are asking

21 Mr. Martinotti to make any legal conclusions.

22 BY MR. LEE:

23 Q. You can answer.

24 A. And I've got to say, I don't know.

25 Q. Let me give you one that we have

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1 discussed a little bit and you are familiar with.

2 (Exhibit 85 was marked for  
3 identification, as of 10/19/17.)

4 BY MR. LEE:

5 Q. I'm marking as Exhibit 85, this is a  
6 copy of the complaint in the Schwarzkopf versus IBM  
7 case. You are familiar with that case, aren't you?

8 A. Yes.

9 Q. And Mr. Schwarzkopf was a sales  
10 representative?

11 A. Yes.

12 Q. At IBM, of course. And he is by this  
13 complaint suing IBM over unpaid commissions?

14 A. Correct.

15 Q. And Mr. Schwarzkopf is claiming that IBM  
16 was bound to pay him commissions under the formula  
17 they provided, correct?

18 A. Correct.

19 Q. And then Mr. Schwarzkopf claimed that  
20 his commissions were unjustifiably reduced; is that  
21 correct?

22 MR. BARNES: And I'm just going to  
23 make the same objections that I made on the  
24 previous exhibit, but go ahead.

25 A. Yeah. He came forward and objected to

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1 how we approached him.

2 Q. Mr. Schwarzkopf said that his  
3 commissions had been capped and IBM wasn't allowed  
4 to cap his commissions; isn't that right?

5 A. Correct, and we did not cap his  
6 commissions and he did not win this suit.

7 Q. Mr. Schwarzkopf misunderstood IBM's  
8 compensation program, didn't he?

9 A. Correct.

10 (Exhibit 86 was marked for  
11 identification, as of 10/19/17.)

12 BY MR. LEE:

13 Q. I'm showing you a copy of Exhibit 86.  
14 Are you familiar with this lawsuit?

15 A. Yes. This was my first one.

16 Q. This was Kavitz versus IBM?

17 A. Correct.

18 Q. When you said it was your first one,  
19 this was the first case --

20 A. Deposition. Sorry.

21 Q. Okay. And Mr. Kavitz was a sales  
22 representative at IBM?

23 A. Yes.

24 Q. And he sued IBM over unpaid commissions;  
25 is that correct?

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1 A. Correct.  
 2 Q. And he claimed IBM was bound to pay him  
 3 commissions under the formula they provided,  
 4 correct?  
 5 MR. BARNES: Then let me just restate  
 6 the same objections.  
 7 MR. LEE: I will give you a line  
 8 objection. What was it? Legal conclusions?  
 9 MR. BARNES: Yeah, that's fine. As to  
 10 complaints or decisions from any of these  
 11 cases, I object to the extent it's calling for  
 12 a legal conclusion and to the extent it is  
 13 assuming facts that aren't in evidence, and I  
 14 don't interrupt any more.  
 15 BY THE WITNESS:  
 16 A. I mean, the answer would be yes because  
 17 he obviously, you know, brought this case forward.  
 18 BY MR. LEE:  
 19 Q. And you gave a deposition in that case,  
 20 so you know the facts, don't you?  
 21 A. Um-hmm. Yes. I'm sorry.  
 22 Q. And my question is, Mr. Kavitz was  
 23 claiming IBM was bound to pay him commissions under  
 24 the formula they provided, right?  
 25 A. Correct.

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1 Q. And that IBM could not cap his  
 2 commissions, right?  
 3 A. Correct.  
 4 Q. And Mr. Kavitz misunderstood IBM's  
 5 compensation plan, didn't he?  
 6 A. Correct.  
 7 (Exhibit 87 was marked for  
 8 identification, as of 10/19/17.)  
 9 BY MR. LEE:  
 10 Q. I'm showing you what I have marked as  
 11 Exhibit 87. This is a copy of another complaint  
 12 filed by Stephen Rudolph against IBM in the  
 13 Northern District of Illinois Federal Court.  
 14 Are you familiar with this case?  
 15 A. No.  
 16 Q. Have you ever heard of Stephen Rudolph.  
 17 A. I knew of Stephen as a software sales  
 18 rep, yes.  
 19 Q. Okay. Did you know that he had sued  
 20 IBM?  
 21 A. No, I did not.  
 22 Q. And so I'm not going to ask you to read  
 23 through that and tell me anything about it.  
 24 You don't know anything about this case  
 25 other than what's written in this document?

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1 A. Correct, I do not know anything about  
 2 this case.  
 3 (Exhibit 88 was marked for  
 4 identification, as of 10/19/17.)  
 5 BY MR. LEE:  
 6 Q. I'm showing you what I have marked as  
 7 Exhibit 88.  
 8 MR. BARNES: I would be happy to  
 9 answer all of your questions about this case  
 10 if you would like me to, Matt.  
 11 MR. LEE: You're next.  
 12 BY MR. LEE:  
 13 Q. Mr. Martinotti, this is a copy of a  
 14 complaint that was filed in the Superior Court of  
 15 the state of California in Los Angeles by Kelli  
 16 Gilmour against IBM.  
 17 Are you familiar with this case?  
 18 A. No.  
 19 Q. Have you ever heard of Kelli Gilmour?  
 20 A. No.  
 21 (Exhibit 89 was marked for  
 22 identification, as of 10/19/17.)  
 23 BY MR. LEE:  
 24 Q. Showing you a copy of what I have marked  
 25 as Exhibit 89. This is a copy of a complaint filed

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1 in California in the City and County of San  
 2 Francisco by Lee Kemp against IBM.  
 3 Are you familiar with this case?  
 4 A. No.  
 5 Q. Have you ever heard of Lee Kemp?  
 6 A. No.  
 7 (Exhibit 90 was marked for  
 8 identification, as of 10/19/17.)  
 9 BY MR. LEE:  
 10 Q. I'm showing you what I have marked as  
 11 Exhibit 90. I'm showing you -- this is a copy of a  
 12 complaint filed in Colorado State Court in Denver  
 13 by David Geras against IBM.  
 14 Are you familiar with this case?  
 15 A. No.  
 16 Q. Do you know who David Geras is?  
 17 A. No.  
 18 Q. That's G-e-r-a-s.  
 19 (Exhibit 91 was marked for  
 20 identification, as of 10/19/17.)  
 21 BY MR. LEE:  
 22 Q. I'm showing you a copy of what I have  
 23 marked as Exhibit 91. This is a copy of a  
 24 complaint filed in Nebraska by Eric --  
 25 A. Bereuter.

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1 Q. There we go.  
 2 -- Eric Bereuter, that sounds good,  
 3 against IBM. Are you familiar with this case?  
 4 A. No.  
 5 Q. Do you know Eric Bereuter?  
 6 A. No.  
 7 Q. I think I have got one you might know.  
 8 A. Oh.  
 9 (Exhibit 92 was marked for  
 10 identification, as of 10/19/17.)  
 11 BY MR. LEE:  
 12 Q. Showing you a copy of what I have marked  
 13 as Exhibit 92. This is a complaint filed in  
 14 Georgia by Peter Wilson against IBM.  
 15 Are you familiar with this case?  
 16 A. Yes.  
 17 Q. Okay. You gave deposition testimony in  
 18 this case; is that correct?  
 19 A. Correct.  
 20 Q. So Mr. Wilson was a sales representative  
 21 for IBM, correct?  
 22 A. Correct.  
 23 Q. And he was suing over unpaid  
 24 commissions?  
 25 A. Correct.

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1 Q. And he was claiming IBM was bound to pay  
 2 him under the commission formula that he was  
 3 provided, correct?  
 4 A. Correct.  
 5 Q. And he claimed that his commissions were  
 6 capped unjustifiably; is that correct?  
 7 A. Correct.  
 8 Q. Mr. Wilson, like the others,  
 9 misunderstood IBM's compensation plan, didn't he?  
 10 MR. BARNES: I'm going to object to  
 11 the extent "the others" is unclear.  
 12 MR. LEE: I will rephrase.  
 13 MR. BARNES: I assume you are talking  
 14 about the other lawsuits, but...  
 15 MR. LEE: I will rephrase.  
 16 BY MR. LEE:  
 17 Q. Like Mr. Schwarzkopf, like Mr. Kavitz,  
 18 Mr. Wilson misunderstood IBM's compensation plan,  
 19 didn't he?  
 20 A. Correct.  
 21 Well, can I amend that? They  
 22 misunderstood why we did the adjustment versus they  
 23 misunderstood the sales plan.  
 24 Q. And what do you mean by that?  
 25 A. The sales plan represents what they, you

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1 know, are paid on. He is not disputing he is being  
 2 paid on it. What he is disputing is that we did an  
 3 adjustment and he is saying that we capped it.  
 4 We didn't cap it. We adjusted it for different  
 5 reasons. That's not misunderstanding the sales  
 6 plan.  
 7 Q. He claimed that IBM didn't have a right  
 8 to adjust the sales plan, right?  
 9 A. Correct.  
 10 Q. So he misunderstood that IBM claimed it  
 11 did have a right?  
 12 MR. BARNES: Objection.  
 13 A. Well, but again, it's in the IPL that he  
 14 signed. The disclaimer is in the IPL.  
 15 Q. I understand that, but Mr. Wilson didn't  
 16 understand that, did he?  
 17 MR. BARNES: Objection.  
 18 A. That's why he brought the suit, yes.  
 19 (Exhibit 93 was marked for  
 20 identification, as of 10/19/17.)  
 21 BY MR. LEE:  
 22 Q. I'm showing you a copy of what I have  
 23 marked as Exhibit 93. This is a lawsuit filed in  
 24 U.S. District Court for the District of Maryland by  
 25 Michelle Leslie against IBM.

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1 Are you familiar with this case?  
 2 A. No.  
 3 Q. And do you know Michelle -- oh. I said  
 4 Michelle. It's Michael.  
 5 A. Michael, yeah.  
 6 Q. I'm sorry. Michael Leslie. Are you  
 7 familiar with Michael Leslie?  
 8 A. No.  
 9 (Exhibit 94 was marked for  
 10 identification, as of 10/19/17.)  
 11 BY MR. LEE:  
 12 Q. I'm showing you what I've marked as  
 13 Exhibit 94. So this is a lawsuit filed in the U.S.  
 14 District Court for the District of New Jersey by  
 15 Griffin Pero versus IBM; is that correct?  
 16 A. Yes.  
 17 MR. BARNES: I'm just going to object  
 18 to the extent it mischaracterizes the  
 19 pleadings here.  
 20 MR. LEE: It does. I'm sorry. Let me  
 21 restate it.  
 22 BY MR. LEE:  
 23 Q. The first page of this is a declaration  
 24 in support of removal. If you look to Exhibit A,  
 25 that was the lawsuit that was filed in New York

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1 State Court -- no -- New Jersey, New Jersey State  
 2 Court by Griffen Pero against IBM. Is that  
 3 correct?  
 4 A. Yes.  
 5 Q. Okay.  
 6 A. Superior Court of New Jersey.  
 7 Q. Are you familiar with this suit?  
 8 A. No, I don't believe I am.  
 9 Q. Do you know Griffen Pero?  
 10 A. I know the name, but I don't recall  
 11 this.  
 12 Q. Is Griffen Pero a sales representative  
 13 for IBM?  
 14 A. Yes.  
 15 Q. Do you know if this lawsuit involved a  
 16 dispute over commissions, over unpaid commissions?  
 17 A. I don't know that.  
 18 (Exhibit 95 was marked for  
 19 identification, as of 10/19/17.)  
 20 BY MR. LEE:  
 21 Q. I'm showing you what I have marked as  
 22 Exhibit 95. This is a lawsuit filed in a Virginia  
 23 court by Charles Tang against IBM and Will Martin.  
 24 Are you familiar with this lawsuit?  
 25 A. No.

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1 Q. Do you know Charles Tang?  
 2 A. No.  
 3 (Exhibit 96 was marked for  
 4 identification, as of 10/19/17.)  
 5 BY MR. LEE:  
 6 Q. I'm showing you what I have marked as  
 7 Exhibit 96. It is a lawsuit filed in Georgia State  
 8 Court by Steve Snyder versus IBM.  
 9 Are you familiar with this lawsuit?  
 10 A. I am not.  
 11 Q. Do you know Steve Snyder?  
 12 A. No, I do not.  
 13 (Exhibit 97 was marked for  
 14 identification, as of 10/19/17.)  
 15 BY MR. LEE:  
 16 Q. I'm showing you what I have marked as  
 17 Exhibit 97.  
 18 A. That was an acquisition situation, that  
 19 96 one.  
 20 Q. I just want to --  
 21 A. The amount that I was reading so far was  
 22 that it was an acquisition, but...  
 23 MR. BARNES: Okay. Wait until he asks  
 24 you a question.  
 25 THE WITNESS: Sorry.

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1 BY MR. LEE:  
 2 Q. Yeah, and you know, I think the court or  
 3 the jury or anyone could come back and read this  
 4 complaint or any of these complaints just as well  
 5 as we can, so my goal here is to find out what you  
 6 know about these lawsuits, and the reason I want to  
 7 have this complaint for you is so I can refresh  
 8 your memory about it if you need to.  
 9 A. Okay.  
 10 Q. So looking at Exhibit 97, this is a  
 11 lawsuit filed in California by Joseph Pfeister --  
 12 MR. BARNES: Pfeister.  
 13 MR. LEE: Pfeister, thank you. I knew  
 14 you would know.  
 15 BY MR. LEE:  
 16 Q. -- Joseph Pfeister against IBM. Are you  
 17 familiar with this lawsuit?  
 18 A. No.  
 19 Q. Do you know a Joseph Pfeister?  
 20 A. No.  
 21 Q. Not to be confused with Jason Pfister.  
 22 MR. BARNES: No, not at all, not at  
 23 all.  
 24 (Exhibit 98 was marked for  
 25 identification, as of 10/19/17.)

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1 BY MR. LEE:  
 2 Q. All right. I'm showing you what I have  
 3 marked as Exhibit 98. This is a lawsuit filed in  
 4 North Carolina Federal Court for the Middle  
 5 District where this same action is pending by Paul  
 6 Vinson versus IBM.  
 7 Are you familiar with this lawsuit?  
 8 A. No.  
 9 Q. Do you know Paul Vinson?  
 10 A. No. It was another acquisition, by the  
 11 way, but I'm sorry, I won't say.  
 12 Q. So the cases you are familiar with are  
 13 really the ones you gave a deposition in,  
 14 Schwarzkopf, Kavitz, Wilson and then, of course,  
 15 this case?  
 16 A. Correct.  
 17 Q. None of the others; we've gone through  
 18 15.  
 19 A. From '98 to -- correct, I do not know  
 20 these.  
 21 Q. We've gone through 15 different lawsuits  
 22 just now.  
 23 A. I think it looks like '80, correct. Are  
 24 those '82? Through '83. So '83 through '98, no, I  
 25 do -- outside of the ones that you just

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1 highlighted, Schwarzkopf, Kavitz and Wilson.

2 Q. Okay. Do you know if any of these --  
3 well, I guess just only the three that you are  
4 familiar with, did any of those go to trial?

5 A. I don't know. I don't follow up on  
6 that. I just did the deposition and that's it.

7 Q. You've never testified at trial, have  
8 you?

9 A. I have not testified at trial.

10 MR. LEE: Do you want to take a quick  
11 break? I think I am actually rounding the  
12 corner. I may have just 20 minutes left or  
13 something like that.

14 MR. BARNES: Yeah, let's do it.

15 MR. LEE: Great.

16 THE VIDEOGRAPHER: Going off the  
17 record at 2:13 p.m.

18 (Recess taken, 2:13 - 2:23 p.m.)

19 THE VIDEOGRAPHER: We are back on the  
20 record at 2:23 p.m.

21 BY MR. LEE:

22 Q. Mr. Martinotti, one of the topics that  
23 we had today was the meeting in Chicago that was  
24 referenced in an e-mail by Tom Bathany. Do you  
25 know anything about that meeting and what he

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1 but the organization within IBM is not  
2 geographic-centric any more. So, in other words,  
3 we don't have a branch office that represents  
4 Chicago. We have businesses and we have the  
5 hardware business, the software business, the  
6 services business. They all have activity. And as  
7 an example, I am in North America software. I am  
8 just housed in Chicago, okay. A friend of mine can  
9 be, you know, in security and he just happens to be  
10 housed in Chicago and his territory is all the  
11 western portion of the Mississippi.

12 So no longer does IBM organize  
13 themselves around geographic cities, things in that  
14 nature. We organize ourselves around businesses.  
15 So it's the communications business, it's the  
16 distribution, it's the insurance, it's that type of  
17 situation.

18 So everyone that's in Chicago that  
19 happens to cover all that is in one of those  
20 organizations, we will get together at a town hall  
21 meeting, you know, once every six months, once a  
22 year just to get, you know, camaraderie, to get  
23 things together, and that's what happens.

24 Q. So what was Tom doing there, Tom  
25 Bathany?

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1 references in his e-mail?

2 A. That was a town hall meeting-type  
3 meeting. I didn't attend it, but that's what that  
4 was.

5 Q. You said a town hall-type meeting. What  
6 does that mean?

7 A. We'd get together our sales force and go  
8 through current-event type of information.

9 Q. Was it everybody from sales reps to VPs?

10 A. Administration to -- yeah. Anyone  
11 that's within the software organization -- or not  
12 the soft- -- anyone within the Chicagoland area has  
13 the ability to go to a town hall, and then they  
14 will go through and break out into, you know,  
15 different individual tech meetings that are, you  
16 know, unique to their specialty.

17 Q. Okay. Well, you said anybody in the  
18 Chicagoland area, so it would be this geographic  
19 region here?

20 A. Correct.

21 Q. So Tom Bathany is in Richmond.

22 A. Correct.

23 Q. What was he doing there?

24 A. So I knew you were going to get there.  
25 The problem with IBM -- I shouldn't say problem,

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1 A. Tom was going and representing the  
2 people that he has here under his umbrella for  
3 his --

4 Q. I see. So he had some sales reps who  
5 were in Chicago or in the area?

6 A. Yeah.

7 Q. And he came to participate and update  
8 them on what was going on?

9 A. Um-hmm.

10 Q. Okay. That makes sense.

11 A. Yes. I'm sorry. I should have said  
12 "yes" instead of...

13 Q. That's all right. Do you know anyone  
14 who was there instead of Tom Bathany?

15 A. No, because I did not attend that  
16 meeting.

17 Q. Okay. How do you know that that's the  
18 meeting he was talking about?

19 A. Simply because of the -- what he was --  
20 his correspondence and his statement that he was  
21 here, and that was the reason why he was here.

22 Q. Okay. You read his e-mail about it, I  
23 think a couple e-mails where he referenced it, and  
24 from that context you are concluding that it was a  
25 town hall meeting for Chicagoland IBM folks?

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<p>1 A. Correct.</p> <p>2 Q. And as you sit here, you can't identify</p> <p>3 anyone besides Tom Batthany who was at that</p> <p>4 meeting?</p> <p>5 A. Correct, I cannot.</p> <p>6 Q. Have you tried to?</p> <p>7 A. No.</p> <p>8 Q. Did Ronnie Rohrer make a million dollars</p> <p>9 in 2015?</p> <p>10 A. I don't know. I would have to go back</p> <p>11 and look.</p> <p>12 Q. You haven't as you sit here today?</p> <p>13 A. I have not.</p> <p>14 (Exhibit 99 was marked for</p> <p>15 identification, as of 10/19/17.)</p> <p>16 BY MR. LEE:</p> <p>17 Q. I'm showing you what I have marked as</p> <p>18 Exhibit 99. This is a copy of IBM's responses to</p> <p>19 our first set of interrogatories in this case.</p> <p>20 Have you seen these before?</p> <p>21 A. Yes.</p> <p>22 Q. And did you assist in answering these</p> <p>23 interrogatories?</p> <p>24 A. I provided whatever archives that I had</p> <p>25 available.</p>	<p>1 organization, it would be John Dunderdale as the</p> <p>2 North America software. He would be given a</p> <p>3 nondisclosure, but nobody below him.</p> <p>4 Q. What do you mean, given a nondisclosure?</p> <p>5 A. He would sign a nondisclosure saying</p> <p>6 that, you know, he is being disclosed information</p> <p>7 that he can't speak about.</p> <p>8 Q. What does that have to do with that?</p> <p>9 A. So, in other words, when they go through</p> <p>10 and do reviews of sales plans and updates or</p> <p>11 changes, they will review it with John for his</p> <p>12 opinion; and so John knows that potentially we are</p> <p>13 going to, say, change the SaaS plan or change the</p> <p>14 transactional plan. That's what --</p> <p>15 Q. So he will know that but he won't</p> <p>16 disclose it to you --</p> <p>17 A. Correct.</p> <p>18 Q. -- because you are saying you understand</p> <p>19 he signed an agreement --</p> <p>20 A. Correct.</p> <p>21 Q. -- with maybe IBM's management above</p> <p>22 him --</p> <p>23 A. Right.</p> <p>24 Q. -- saying that he won't disclose those</p> <p>25 kinds of things to anyone below his level?</p>
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<p>1 Q. You provided documents; is that what you</p> <p>2 are saying?</p> <p>3 A. Yes.</p> <p>4 Q. If you look at Pages 4 and 5, the</p> <p>5 response to Interrogatory No. 4, this is about the</p> <p>6 process for determining what commissions will be</p> <p>7 paid; and I want to ask you a focused question</p> <p>8 about a portion of the IPL that's quoted in this</p> <p>9 response.</p> <p>10 At the very bottom of Page 5 -- read as</p> <p>11 much of it as you want to. I don't want to stop</p> <p>12 you.</p> <p>13 Down at the last sentence on Page 5 it</p> <p>14 says, it quotes the language from the IPL that</p> <p>15 "Managers below the highest level of management do</p> <p>16 not know whether IBM will or will not change or</p> <p>17 adopt any particular compensation plan."</p> <p>18 Do you see that?</p> <p>19 A. Correct, yes.</p> <p>20 Q. Who is included in this managers below</p> <p>21 the highest -- well, strike that. I phrased that</p> <p>22 incorrectly.</p> <p>23 What managers are at the highest level</p> <p>24 of management?</p> <p>25 A. Within the geo, within the North America</p>	<p>1 A. Correct.</p> <p>2 Q. Why is that?</p> <p>3 A. You only want information for the</p> <p>4 current sales plan period that is relevant for the</p> <p>5 current sales plan period out in the field. You</p> <p>6 don't need to go through and discuss and make</p> <p>7 available any future thoughts or plans because you</p> <p>8 don't want to influence or negatively influence,</p> <p>9 positively or negatively influence.</p> <p>10 Q. So this comment really relates more to</p> <p>11 future plans; is that what you are saying?</p> <p>12 A. Yes.</p> <p>13 Q. All right.</p> <p>14 (Exhibit 100 was marked for</p> <p>15 identification, as of 10/19/17.)</p> <p>16 BY MR. LEE:</p> <p>17 Q. Showing you what I have marked as</p> <p>18 Exhibit 100. These are IBM's supplemental</p> <p>19 responses to our first sets of discovery.</p> <p>20 Have you seen these before?</p> <p>21 A. Yeah.</p> <p>22 Q. Did you assist in preparing these?</p> <p>23 A. Again, with outside of, you know,</p> <p>24 providing my archives.</p> <p>25 Q. Now, if you look at Interrogatory No. 6,</p>

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1 the very last line there refers to some page  
2 numbers there. I just want to confirm, the very  
3 last -- right here (indicating).

4 A. Oh, okay.

5 Q. I just want to confirm that what's been  
6 referred to there is that chart, spreadsheet that  
7 we have talked about before today.

8 A. 427, yes.

9 Q. And that's Exhibit...

10 A. 64.

11 MR. LEE: Okay. Great.

12 And Justin, I didn't see a

13 verification on these, but that doesn't mean  
14 you didn't give it. I just don't know. Do  
15 you know if you guys have done a verification?

16 MR. BARNES: I would assume so, but  
17 let me double-check.

18 MR. LEE: I was kind of thinking you  
19 did too, but I don't know.

20 MR. BARNES: I can double-check that.

21 MR. LEE: Will Mr. Martinotti be  
22 verifying these if he hasn't already, or do  
23 you know who would do it?

24 MR. BARNES: Yes.

25 MR. LEE: Do you want to handle it

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1 BY MR. LEE:

2 Q. All right, Mr. Martinotti. I'm showing  
3 you what I have marked as Exhibit 101. It's a copy  
4 of IBM's responses to our second set of  
5 interrogatories. Have you seen these?

6 A. Yes.

7 Q. Are these responses complete and  
8 accurate to the best of IBM's knowledge?

9 A. Yes.

10 MR. LEE: All right. If you will give  
11 me one minute just to look over my notes, we  
12 may be finished.

13 MR. BARNES: Yes. One minute, that's  
14 it, 60 seconds.

15 MR. LEE: Start the clock.

16 MR. BARNES: It's ticking away.

17 MR. LEE: That's all I have.

18 Mr. Martinotti, I appreciate your time today.  
19 I don't have any further questions for you.

20 THE WITNESS: Okay.

21 MR. BARNES: I have a couple of  
22 followups just to clarify a couple of things.

23 EXAMINATION

24 BY MR. BARNES:

25 Q. You remember talking earlier about the

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1 real quickly?

2 MR. BARNES: Yeah, sure.

3 BY MR. LEE:

4 Q. Mr. Martinotti, Exhibits 99 and 100 are  
5 the responses to these interrogatories by IBM --

6 MR. BARNES: I know for sure that  
7 99 -- I'm sorry to interrupt you.

8 MR. LEE: That's okay.

9 MR. BARNES: I know for sure that we  
10 served a verification for 99. I thought we  
11 did one for 100 too, but I can't be sure about  
12 100, so I don't know if we need to go through  
13 the process with 99. I can probably pull that  
14 up real quick.

15 MR. LEE: I'm just going to ask him.  
16 I think that would pretty much handle it, I  
17 think.

18 BY MR. LEE:

19 Q. Mr. Martinotti, Exhibits 99 and 100,  
20 they contain IBM's responses to our  
21 interrogatories. Are these responses complete and  
22 accurate to the best of IBM's knowledge?

23 A. Yes.

24 (Exhibit 101 was marked for  
25 identification, as of 10/19/17.)

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1 review on the BB&T deal of Bobby's commissions is  
2 based on relative contribution. Do you remember  
3 saying that?

4 A. Yes.

5 Q. "Relative" to me seems that it suggests  
6 it's relative to something else, and I just want to  
7 make sure we are clear on what you mean by  
8 "relative contribution."

9 A. How his performance matched with the  
10 other participants and balanced with the other  
11 participants.

12 Q. And how his pay balanced with the others  
13 as well?

14 A. Yes.

15 Q. You also remember talking about the  
16 Phillips deal earlier today?

17 A. Yes.

18 Q. And you explained the differences  
19 between that inspection and the BB&T inspection.  
20 Do you remember talking about that?

21 A. Yes.

22 Q. Is that still considered a significant  
23 transaction review, the Phillips deal?

24 A. Yes.

25 Q. And IBM's position that it has the

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1 ability to review the commissions in those sorts of  
 2 deals, what is that based on?  
 3 A. I'm not sure I'm following your  
 4 question.  
 5 Q. So is it based on the terms of the IPL?  
 6 A. Yes.  
 7 Q. Let's look at Exhibit 45 really quick.  
 8 I just want to make sure this is clear. If you'd  
 9 look at the second page of that where it says  
 10 primary revenue achievement was 3.9 million.  
 11 A. Correct.  
 12 Q. Is that the total revenue achievement  
 13 for the first half of '15 --  
 14 A. Correct.  
 15 Q. -- or just one deal?  
 16 A. No. That's the total for this time  
 17 period of this specific statement.  
 18 Q. Okay. So the --  
 19 A. So this is the full six months or the --  
 20 yeah, this is the full, so this is everything in  
 21 his territory.  
 22 Q. Okay. And the incentive amounts that  
 23 are listed on here, those would be the total  
 24 amounts for the plan period too, correct?  
 25 A. Correct.

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1 Q. And then lastly, would you defer to Tom  
 2 and Hale's testimony about what they discussed  
 3 with Bobby Choplin?  
 4 A. Yes.  
 5 Q. Actually one more, not lastly. You  
 6 remember talking about the sales kickoff meeting in  
 7 Vegas earlier today?  
 8 A. Yes.  
 9 Q. Do you know whether the word "uncapped"  
 10 was actually used at that meeting?  
 11 MR. LEE: Objection.  
 12 A. No.  
 13 MR. BARNES: That's all I have got.  
 14 FURTHER EXAMINATION  
 15 BY MR. LEE:  
 16 Q. Mr. Martinotti, what, if any, evidence  
 17 do you have that Bobby Choplin was ever told that  
 18 the Phillips deal was reviewed under the  
 19 significant transaction policy?  
 20 A. What evidence?  
 21 Q. Yes.  
 22 A. I thought there was correspondence with  
 23 him about Phillip. There's e-mails with Phillips.  
 24 Yeah, there's -- aren't there?  
 25 Q. Are you saying there is an e-mail that

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1 informed Bob Choplin directly that the Phillips  
 2 deal --  
 3 A. Let's put it this way: I don't know.  
 4 Q. Mr. Barnes asked you whether the word  
 5 "uncapped" was used at the 2015 first half kickoff  
 6 meeting.  
 7 A. Yes.  
 8 Q. Can you say that it wasn't used?  
 9 A. No.  
 10 MR. LEE: I don't have any other  
 11 further questions. Thank you.  
 12 MR. BARNES: We will reserve the right  
 13 to read and sign.  
 14 THE VIDEOGRAPHER: Going off the  
 15 record at 2:44 p m. This concludes the  
 16 videotaped deposition of Mr. Martinotti.  
 17 (At 2:44 p m. the deposition was  
 18 concluded.)  
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1 CERTIFICATE OF CERTIFIED SHORTHAND REPORTER  
 2 I, PAULINE M. VARGO, a Certified  
 3 Shorthand Reporter of the State of Illinois,  
 4 C S R No. 84-1573, do hereby certify:  
 5 That previous to the commencement of the  
 6 examination of the witness, the witness was duly  
 7 sworn to testify the whole truth concerning the  
 8 matters herein;  
 9 That the foregoing deposition transcript  
 10 was reported stenographically by me and thereafter  
 11 reduced to typewriting under my personal direction;  
 12 That the witness has requested a review  
 13 of this transcript pursuant to Rule 30(e)(1);  
 14 That the foregoing constitutes a true  
 15 record of the testimony given by said witness  
 16 before this reporter;  
 17 That I am not a relative, employee,  
 18 attorney or counsel, nor a relative or employee of  
 19 such attorney or counsel, for any of the parties  
 20 hereto, nor interested directly or indirectly in  
 21 the outcome of this action  
 22 CERTIFIED TO THIS 27th DAY OF OCTOBER,  
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Richard Martinotti

<p style="text-align: right;">Page 198</p> <p>1 INSTRUCTIONS TO WITNESS</p> <p>2</p> <p>3 Please read your deposition over</p> <p>4 carefully and make any necessary corrections. You</p> <p>5 should state the reason in the appropriate space on</p> <p>6 the errata sheet for any corrections that are made.</p> <p>7 After doing so, please sign the errata</p> <p>8 sheet and date it. It will be attached to your</p> <p>9 deposition.</p> <p>10 It is imperative that you return the</p> <p>11 original errata sheet to the deposing attorney</p> <p>12 within thirty (30) days of receipt of the</p> <p>13 deposition transcript by you. If you fail to do</p> <p>14 so, the deposition transcript may be deemed to be</p> <p>15 accurate and may be used in court.</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 200</p> <p>1 CASE NAME: Choplin vs. IBM</p> <p>2 1:16-cv-1412-TDS-JEP</p> <p>3 I hereby certify that I have read the</p> <p>4 foregoing transcript of my deposition, given on</p> <p>5 October 19, 2017, at the place aforesaid,</p> <p>6 consisting of pages 1 through 200, and I do</p> <p>7 again subscribe and make oath that the same is</p> <p>8 a true, correct, and complete transcript of my</p> <p>9 deposition so given as aforesaid, as it now appears.</p> <p>10 Please check one:</p> <p>11 <input type="checkbox"/> I made no corrections</p> <p>12 <input type="checkbox"/> Number of errata sheets</p> <p>13 submitted</p> <p>14</p> <p>15 (Signed)</p> <p>16</p> <p>17</p> <p>18 <u>RICHARD MARTINOTTI</u> DATE _____</p> <p>19</p> <p>20</p> <p>21 SUBSCRIBED AND SWORN TO</p> <p>22 before me this day _____</p> <p>23 of _____, A.D. 20____.</p> <p>24</p> <p>25 <u>Notary Public</u></p>
<p style="text-align: right;">Page 199</p> <p>1 ERRATA</p> <p>2 CASE NAME: Choplin vs IBM</p> <p>3 30(b)(6) DEPOSITION OF: IBM by RICHARD MARTINOTTI</p> <p>4 DATE TAKEN: October 19, 2017</p> <p>5 PAGE LINE CHANGE</p> <p>6</p> <p>7 REASON: _____</p> <p>8</p> <p>9 REASON: _____</p> <p>10</p> <p>11 REASON: _____</p> <p>12</p> <p>13 REASON: _____</p> <p>14</p> <p>15 REASON: _____</p> <p>16</p> <p>17 REASON: _____</p> <p>18</p> <p>19 REASON: _____</p> <p>20</p> <p>21 REASON: _____</p> <p>22</p> <p>23 REASON: _____</p> <p>24</p> <p>25 REASON: _____</p>	

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